

Supreme Court, U. S.

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IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1977

No. ....**77-1105**

ANTHONY HERBERT,

*Petitioner,*

—against—

BARRY LANDO, MIKE WALLACE, COLUMBIA BROADCASTING  
SYSTEM, INC., ATLANTIC MONTHLY COMPANY,

*Defendants,*

BARRY LANDO, MIKE WALLACE and CBS INC.,

*Respondents.*

**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

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 October Term, 1977

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ANTHONY HERBERT,

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**PETITION FOR WRIT OF CERTIORARI TO THE  
 UNITED STATES COURT OF APPEALS  
 FOR THE SECOND CIRCUIT**

To the Justices of the Supreme Court of the United States:

Petitioner, Anthony Herbert ("Herbert"), respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit reversing and remanding the order of the United States District Court for the Southern District of New York and prohibiting inquiry during discovery into the publisher's state of mind in this action governed by the principles of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

### Opinions Below

The opinion of the Court of Appeals for the Second Circuit is unreported and is reproduced in Appendix A (1a-52a) of this Petition. The opinion and order of the District Court denying defendants' motion to restrict discovery is reported at 73 F.R.D. 387 (S.D.N.Y. 1977) and is reproduced in Appendix B (53a-89a). The opinion and order of the District Court certifying its prior opinion and order is unreported and is reproduced in Appendix C (90a-98a).

### Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on November 7, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

### Questions Presented for Review

1. Whether the ruling of the Court of Appeals, by creating an absolute privilege to *Sullivan* libel defendants not to disclose their state of mind, has upset the constitutional balance, struck by *New York Times v. Sullivan* and its progeny, which permits liability for defamatory falsehood under the reckless disregard branch of actual malice where plaintiff has satisfied the heavy burden of proof regarding the reporter's subjective state of mind?

2. Whether the ruling of the Court of Appeals has misapplied decisions of this Court regarding First Amendment protections of the media in other areas in creating an absolute privilege of non-disclosure of the reporter's state of mind in *Sullivan* libel cases?

3. Whether the ruling of the Court of Appeals, by prohibiting direct proof of defendant's subjective state of mind in a *Sullivan* libel case, has substantially eliminated the

possibility of liability under the Supreme Court's subjective test for establishing liability based upon reckless disregard?

4. Whether the ruling of the Court of Appeals has immunized from liability all malicious defamations where the basis for liability arises during the editorial process?

### Statement of the Case

Herbert, a Retired United States Army Lieutenant Colonel, brought this defamation action under 28 U.S.C. §1332(a) against respondents ("defendants") and Atlantic Monthly Company for a broadcast entitled "The Selling of Colonel Herbert", presented by CBS on its 60 MINUTES Program ("Program") and produced by Mike Wallace and Barry Lando, and an article published by Atlantic Monthly and written by Lando.

### The Complaint

The complaint alleges that Herbert enlisted in the U.S. Army at the age of 17 and rose through the ranks to become a Lieutenant Colonel. He spent 24 years in military service, and gained the highest professional reputation among his fellow soldiers and officers, as well as among the general public. He was the recipient of many awards and citations and during the 1950's toured much of the world on behalf of the United States Army. From September, 1968 to April, 1969 Herbert served with the 173rd Airborne Brigade in Viet Nam. On April 4, 1969, Herbert was relieved as Commander of the 2nd Battalion and was given a bad efficiency report. While in Viet Nam, Herbert reported to his superior officers atrocities committed and permitted by United States forces in violation of international law and military regulations. After his relief from command, Herbert attempted to process charges against his superior officers, General John W. Barnes and Colonel J. Ross Franklin, for failing to act upon his re-

ports and complaints and for covering up the charged atrocities. After months without any indication of action, Herbert filed a formal complaint with the Inspector General's Office in Ft. McPherson, Georgia against Franklin and Barnes. In March of 1971, Herbert brought formal charges at the U.S. Army Criminal Investigation Division (CID). Television and newspaper publicity regarding these charges followed. The Army conducted an investigation resulting in the dismissal of the charges. Ultimately, the Army itself conceded that 7 of the 8 incidents which Herbert charged his superiors had covered up did occur in the 173rd area of operations.

On February 4, 1973, CBS presented "The Selling of Colonel Herbert" as a factual report of its investigation into the validity of Herbert's allegations. The complaint alleges that the program falsely and maliciously depicted Herbert as a liar in his assertions that he had reported many atrocities to Col. Franklin or General Barnes, as a man capable of brutality to Vietnamese prisoners, and as a person who had used the war crimes charges as an excuse for his relief from command. As a result of the Program, Herbert's reputation was destroyed and he sustained severe financial loss.\*

#### **Discovery and the State of Mind Issues**

During discovery, defendants objected to certain of Herbert's Rule 34 requests and to certain questions asked at the depositions of Lando and Wallace. These questions, in the main, focused upon Lando's state of mind during the preparation and presentation of the Program. More specifically, these inquiries involved Lando's conclusions regarding people or leads to be pursued or not to be pursued and facts obtained from interviewees; his view of the veracity of persons interviewed; the bases for some of his conclusions; conversations between Lando and Wal-

\* The answers of the defendants raised several affirmative defenses, including the First and Fourteenth Amendments to the United States Constitution.

lace on matters to be included or excluded from the broadcast; and Lando's intentions in including or excluding certain materials.\* These questions related to matters presented on the Program and conflicting or impeaching matters not presented and sought to ascertain whether Lando was subjectively aware of the probable falsity of statements presented on the broadcast by directly ascertaining Lando's state of mind on these matters. The importance of the now prohibited questions to a plaintiff's ability to satisfy the heavy burden of proving actual malice is highlighted by a brief description of the context of many of these questions.

Prior to the presentation of the Program, Lando had obtained or seen a filmed statement by one of Herbert's company commanders that Herbert warned him never to have his command involved in any atrocities; a sworn statement by another of Herbert's company commanders that he was constantly being reminded by Herbert to watch out for the safety of the civilian population; a sergeant's statement that an angry Herbert had spoken to his entire Company condemning the murder of Vietnamese detainees on February 14, 1969 at Cu Loi; sworn statements by a Brigade Surgeon and by a Battalion Surgeon of Herbert's concern for good medical care and treatment of the Vietnamese population; a helicopter pilot's statement of Herbert's briefing to the pilots not to shoot Vietnamese civilians or detainees and of Herbert's humane treatment of the Vietnamese.

None of these statements is presented, referred to or quoted from on the Program. Instead, the Program presented a filmed statement by General Barnes that "[Herbert] was a killer" and a comment by Wallace that there are men "who claim that Herbert was an officer who could be brutal with captured enemy prisoners himself". Wallace proceeded to present or describe statements from three

\* See 19a-20a.

soldiers painting a picture of Herbert as a brutal man. During discovery it was disclosed (a) that the story of one of those soldiers was not supported by anyone and that a number of people had advised Lando that the soldier could not be trusted; (b) that Lando had specifically noted that the story of the second soldier had to be checked as to whether Herbert had actually witnessed the beating involved, yet he was never contacted again even after Lando was told by another soldier that Herbert could not have seen the beating; and (c) that Lando lacked any corroboration of any aspect of the third soldier's story.\*

Having discovered these facts, plaintiff then asked Lando at his deposition questions concerning his state of mind on these matters, i.e.; his conclusions, bases and intentions for pursuing, presenting and endorsing statements portraying Herbert as a brutal man, insensitive to the atrocities committed against the Vietnamese, while ignoring and excluding all statements describing Herbert as concerned about the treatment of the Vietnamese population and outraged about atrocities. Plaintiff was seeking by these questions direct proof of the critical issue of whether CBS and its producers Lando and Wallace entertained serious doubts concerning the truth of matters stated and presented on the Program picturing Herbert as a brutal man.

The same context existed for now precluded questions in other areas. During the discovery process it was disclosed that Lando had conducted a second filmed interview of Franklin in which Franklin admitted that he frequently would "tune-out, turn-off" when Herbert was talking and that it was certainly possible that Herbert could have made comments criticizing the ARVN (the South Vietnam Army)

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\* While the Program never hints that CBS' investigation uncovered anything showing Herbert's consideration for the treatment of Vietnamese prisoners or his activities condemning atrocities, Wallace noted on the Program that several men said "it's not so" in reference to the claim that Herbert himself could be brutal with captured enemy prisoners.

or American advisors about the mistreatment of the Vietnamese.\* Through discovery plaintiff for the first time became aware of two sworn statements of Captain Jack Donovan in CBS' possession which stated that Donovan was certain Herbert had complained of the Cu Loi killings to Brigade Headquarters. In the first statement Donovan swore he was certain the report by Herbert was made to Franklin; in the second statement, given after the Army CID called him back, Donovan stated he could not be absolutely certain it was Franklin to whom Herbert was talking, but believed it to be him. During discovery plaintiff also learned of extensive cooperation between CBS and the Pentagon in the preparation for the Program.\*\* It was disclosed, for example, that Pentagon and other Army officers spoke to active-duty men when CBS sought the Army's assistance in locating people to be interviewed, and urged them to cooperate with interview requests; Lando also admitted his knowledge of the Pentagon's extensive animosity toward Herbert which included the organizing of an anti-Herbert "briefing team" which toured Army bases during 1972.

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\* The February 14 killings at Cu Loi involved South Vietnamese forces accompanied by an American advisor.

\*\* In fact, during the pendency of CBS' motion on the disputed questions and the appeal below, plaintiff, in a Freedom of Information Act suit, ascertained that prior to CBS developing its "investigation," Lando told the Pentagon's Information Officer that Lando's premise was that Herbert was a liar and that there would be no story if Herbert's account could not be "debunked." Thereafter, at the time of his first interview with Franklin in the Pentagon, Lando repeated his interest in debunking Herbert and further told the Information Officer that Wallace "is equally convinced that the story is in debunking Herbert" and that the story "will not go unless he can convincingly portray Herbert as the bad guy." Lando later stated to General Sidle of the Pentagon Information Office that his "piece is aimed at debunking Herbert in his long fight against the Army." These conversations were not disclosed by Lando at his deposition.

On the Program, nothing from Franklin's second interview was noted or excerpted;\* rather, the Program presented from Franklin's first interview his assertion that Herbert never discussed war crimes or atrocities with him. Similarly, nothing on the Program even remotely implied that CBS had any statements of anyone who heard Herbert report the Cu Loi killings to Brigade Headquarters; to the contrary, Wallace specifically stated on the Program that none of the men who served under Herbert in Vietnam "were certain that he had actually reported" the February 14 killings. The Pentagon's relationship to the preparation of the Program and its activities regarding Herbert were ignored on the Program except for a denial by Captain Grimshaw that he was under any pressure from Pentagon representatives to show up at the Pentagon for a CBS interview.\*\*

Plaintiff sought to obtain direct evidence of defendants' state of mind as to the truth or falsity of these matters which either appeared on the Program or contradicted material which was broadcast by inquiring as to Lando's conclusions regarding Franklin's second interview, his view of Franklin's veracity and credibility, his intention in excluding from the Program any reference to the Donovan statements, his belief as to the impact of including a refer-

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\* Apparently, the Program's viewers were not the only ones deprived of all information concerning the second interview. At his deposition Wallace testified that he did not recall knowing about a second Franklin interview prior to the institution of this action.

\*\* At the time of his interview at the Pentagon Grimshaw also stated that he knew that there were people at the Pentagon who even then "do not like" what he had previously stated in support of Herbert. At a later interview Grimshaw admitted he felt some pressure from having been told by another major he was "dead careerwise" because Herbert had published a Grimshaw statement in his book. At both filmed interviews Grimshaw told of Herbert urging him not to have his company involved in any atrocities. None of these statements appears in any form on the Program.

ence to Army activities regarding Herbert's charges, his conclusions as to Army activities regarding the preparation of the Program, his views of the veracity of Pentagon representatives, his intention in excluding from the Program any reference by Grimshaw to his discussions with Pentagon officers or to feeling any pressure to support the Army's position.

### The Decisions Below

After reviewing the principles of *New York Times v. Sullivan* and its progeny, the centrality of the subjective state of mind of the publisher in establishing actual malice under those principles and the particularly heavy burden of proof placed upon *Sullivan* case plaintiffs, the District Court concluded that the defendants must answer the open questions concerning their state of mind. The District Court thereafter amended its prior Memorandum and Order so as to include a finding pursuant to 28 U.S.C. §1292(b) as a prerequisite to an application for an interlocutory appeal. On November 7, 1977, the Court of Appeals issued its decision reversing and remanding the District Court Order and holding that the journalist's opinions, conclusions and thoughts (state of mind) on matters relating to investigation or publication are absolutely privileged from discovery by a *Sullivan* case plaintiff because the First Amendment has immunized the editorial process from judicial scrutiny.

The factual description in Chief Judge Kaufman's opinion is perplexing in its unrestricted adoption of statements made in Lando's disputed Atlantic Monthly article, its misstatements of fact\* and its failure to focus on the spe-

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\* The opinion noted that Lando "produced a laudatory report which was televised on July 4, 1971 over the CBS Network" (15a). No such report exists. Judge Kaufman also wrote that "Lando obtained Franklin's hotel bill and a cancelled check in payment of that bill" (16a); however, on the face of the two documents it is indisputable that a \$25.00 balance remained after crediting the amount of the check.

cific factual matters which gave rise to the state of mind questions. For example, while Chief Judge Kaufman noted that a Captain Bill Hill recalled that Herbert reported war crimes to someone but could not say with "total certainty" that Franklin was the individual (16a),\* he made no reference to the two sworn statements of Captain Donovan that he was certain Herbert reported the February 14th war crimes to Brigade Headquarters. Nowhere does the opinion specifically consider the critical nature of questions directed to Lando's state of mind concerning these statements in obtaining proof that CBS acted with actual malice when Wallace stated on the Program that "none [of the men who served with Herbert] was certain that he had actually reported [the February 14th killings]".

Similarly, Chief Judge Kaufman described a Lando interview with Bruce Potter (16a-17a) but nowhere in his detailing of the facts does he refer to any of the interviews or statements obtained by Lando from Potter and others which portrayed Herbert as concerned about the treatment of the Vietnamese and angered at the commission of atrocities. The opinion, thus, failed to analyze the concrete factual framework in which inquiry was made relating to Lando's doubts as to the truth of matters concerning Herbert's view of brutality presented on the Program.

Both Chief Judge Kaufman and Judge Oakes, concurring, recognized the significance of the issue determined by the Court of Appeals. The Chief Judge stated that the Court of Appeals had permitted the interlocutory appeal because of

[t]he critical importance of the issue, whether the First Amendment erects any barriers to discovery of the editorial process. . . . (21a)

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\* Not even this statement by Captain Hill was included or referred to on the Program.

Judge Oakes noted that he had written a concurring opinion

[b]ecause this case breaks new ground in an area of utmost importance. . . . (23a)\*

## REASONS FOR GRANTING THE WRIT

**The Creation of an Absolute Privilege of Non-Disclosure of Editorial Judgment in Libel Cases Has Fundamentally Altered the Principles of *New York Times v. Sullivan* and Its Progeny.**

### 1. This Court's Delicate Balancing of Important Social Interests from *Sullivan* to the Present Has Never Included a Recognition of the Absolute Privilege Granted by the Court Below.

From the decision in *New York Times v. Sullivan* to the present the Supreme Court has sought to fashion principles in the area of libel which balance the concerns of the First Amendment for uninhibited, robust and wide-open debate on public issues with the historic recognition of a right of legal redress to persons damaged by false and defamatory publications.\*\* Striking that balance has led the Court to

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\* The ground-breaking nature of the decision below was featured in virtually every major media publication. See, e.g., *New York Times*, editorial, "The Limits of Libel," November 10, 1977, p. A22; *Washington Post*, "Extending the Cloak of Press Protection," November 12, 1977, p. A19; *Wall Street Journal*, "Court, in CBS Case, Limits Examination of Journalist's Decision-Making Methods," November 8, 1977, p. 8; *Time*, "The Press," November 21, 1977, p. 103.

\*\* See e.g.: *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341-343 (1974). In *Rosenblatt*, *supra*, 383 U.S. at 86, Mr. Justice Brennan wrote that "important social values . . . underlie the law of defamation. Society has a pervasive and strong interest in preventing and redressing attacks upon reputation."

grant significant additional protections against liability to those who have published alleged false defamations against public officials and, thereafter, public figures.\* Although the position has been urged upon the Court,\*\* a majority of the Justices have never concluded that securing the guarantees of the First Amendment required an elimination of liability to public officials or public figures for libel.

In *Sullivan* the Court concluded that it was essential to establish a "defense for erroneous statements honestly made"\*\*\* in order to fulfill the constitutional guarantees. This defense was there formulated as requiring a public official seeking recovery for a defamatory falsehood to prove that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not. . . .† The substance of reckless disregard has been considered on a number of occasions by the Court. The critical outcome of these considerations has been the formulation of a subjective test in determining the state of mind of the reporter in regard to the truth or falsity of the statements published. In *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964), the Court

\* The area encompassed by these additional protections has changed during the years as the Court has sought to refine this balance. Compare: *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Time, Inc. v. Firestone*, 424 U.S. 448 (1976). In *Firestone*, *supra*, 424 U.S. at 456, Mr. Justice Rehnquist described the *Gertz* decision as an attempt to seek "a more appropriate accommodation between the public's interest in an inhibited press and its equally compelling need for judicial redress of libelous utterances." The proper place of plaintiff in relationship to this area has not been determined although it is assumed at this stage that he falls within the area subject to the *Sullivan* principles.

\*\* See Black, J. concurring (with Douglas, J. joining) in *New York Times v. Sullivan*, 376 U.S. at 293.

\*\*\* *Ibid.*, at 278.

† *Ibid.*, at 279-280.

described the required state of mind to establish a "reckless disregard for truth" as one where the defendant has made the false statements with "a high degree of awareness of their probable falsity"; in *Curtis Publishing Co. v. Butts*, *supra*, 388 U.S. at 153, Mr. Justice Harlan described it as "the publisher's awareness of probable falsity"; Mr. Justice White in *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968) wrote of the required state of mind as one where the publisher "entertained serious doubts as to the truth of his publication," and, finally, the subjective nature of the test was noted in the Court's statement in *Gertz v. Robert Welch, Inc.*, *supra*, 418 U.S. at 334 n. 6, that *St. Amant* "equated reckless disregard of the truth with subjective awareness of probable falsity. . . ."

From 1964 to the present the Court has imposed upon plaintiffs in *Sullivan* cases a heavy burden of proof applicable to the evidence a plaintiff must marshal to satisfy the subjective test required for establishing reckless disregard. At no time during these 14 years of decisions has the molding of the subjective state of mind test triggered any accompanying prohibition on the direct proof of that state of mind or any concern that the proof called for by the test will threaten an allegedly immunized area of media activity.

## 2. The Misapplication of Confidential Source Cases to Establish an Absolute Privilege for Editorial Judgment.

In an effort to support the absolute prohibition on discovery regarding a media defendant's state of mind, Chief Judge Kaufman relies upon *Branzburg v. Hayes*, 408 U.S. 655 (1972) as establishing a privilege for the journalist to protect his sources. However, no matter what else can be garnered from the opinions in *Branzburg* one thing is clear: this Court rejected the notion that the media's need to acquire newsworthy material justified an absolute prohibition upon discovery of the newsman's source. To utilize *Branzburg* as a basis for creating an absolute privilege is,

therefore, to stand that case on its head and to give it a meaning contrary to its holding and its written opinions.\*

Moreover, Chief Judge Kaufman's opinion ignores the factors particular to a libel suit where discovery is sought of the subjective state of mind of the reporter which distinguish that situation from the usual circumstances where the identity of a confidential source is sought. In the former case, the reporter is a party being asked to account for his or her own activities in publishing statements alleged to be outside of First Amendment protections under *Sullivan* principles; in the latter, the reporter's own activity is not the subject of a claim of wrongdoing and information regarding that activity is normally being sought to assist others in a litigation to which the reporter is not a party.\*\* Similarly, in the case of compelled confidential source disclosure, revelation of sources may well constitute a threat to the journalist's ability to gather news by drying up future sources, regardless of whether or not the activities involved were constitutionally protected because of the absence of actual malice; in the libel situation, the reporter's newsgathering activities remain unaffected and any other activities are only affected

\* *Branzburg*, in its citation of *Garland v. Torre*, 259 F.2d 545, 550 (2d Cir. 1958), cert. denied, 358 U.S. 910 (1958), *supra*, 408 U.S. at 686, specifically recognized that in libel cases the newsman's source is not immune from discovery. See also, *Carey v. Hume*, 492 F.2d 631, 637 (D.C.Cir. 1974), *pet. for cert. dismissed*, 417 U.S. 938 (1974); *Caldero v. Tribune Publishing Co.*, 98 Idaho 288, 562 P.2d 791, cert. denied, 46 U.S.L.W. 3288 (U.S. Oct. 31, 1977).

\*\* These distinctions are noted in *Baker v. F&F Investment*, 470 F.2d 778, 783-784 (2d Cir. 1972), cert. denied, 411 U.S. 966 (1973) and *Apicella v. McNeil Laboratories, Inc.*, 66 F.R.D. 78, 81-82 (E.D.N.Y. 1975). *Cervantes v. Time, Inc.*, 464 F.2d 986, 992 (8th Cir. 1972), cert. denied, 409 U.S. 1125 (1973), where source disclosure was sought from a party defendant, did not disturb these distinctions. There the Court of Appeals specifically recognized that the First Amendment did not grant to reporters a privilege to withhold their sources in a libel suit but held that in the case before it, where there was no indication that the libel suit had any merit, such disclosure would not be compelled.

when inquiry regarding the journalist's state of mind would disclose evidence relevant to establishing actual malice.\* Disclosure of such evidence might affect a reporter in regard to publishing with actual malice in the future; but neither *Sullivan* nor any of its progeny ever extended a constitutional protection to a false and defamatory statement dishonestly made.\*\*

\* The imagined chilling effect of judicial scrutiny of the reporter's state of mind, for which no concrete evidence has been presented in this action, is quite strikingly distinct from the documented chilling effect of compelled source disclosure. A 1971 survey of journalists, for example, indicated that more than 90% of those interviewed were more concerned with protecting confidential sources than with protecting the content of confidential information acquired in the newsgathering process. Blasi, "The Newsman's Privilege: An Empirical Study," 70 *Mich. L.Rev.* 277-278 (1971). Despite the demonstrated impact of source disclosure upon press activities, this Court was unwilling in *Branzburg* to grant a Constitutional privilege to the press, while the decision below grants an absolute privilege to the *Sullivan* reporter defendant to refuse to reveal critical state of mind matters arising at any time during the editorial process. See also, *Gilbert v. Allied Chemical Corp.*, 411 F.Supp. 505, 510, 511 (E.D.Va. 1976) where, in a non-libel case, the court distinguished a claim of qualified privilege in regard to confidential sources from a claimed privilege of non-disclosure for editorial matters, and refused to grant a privilege for the latter.

\*\* In *Garrison v. Louisiana*, *supra*, 379 U.S. at 75, Mr. Justice Brennan wrote:

Calculated falsehood falls into that class of utterances which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . ." *Chaplinsky v. New Hampshire*, 315 US 568, 572, 86 L ed 1031, 1035, 62 S Ct 766. Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.

### 3. The Misapplication of Cases Concerning Government Attempts to Direct What Shall be Published.

The opinion below also relies upon the decisions of this Court in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) and *Columbia Broadcasting System v. Democratic National Committee*, 412 U.S. 94 (1973) which afforded the media absolute protection from a particular state activity—requiring the media to publish certain material—as authority for absolute protection of an area of media activity—the editorial process. Contrary to the analysis of the Court below, the grant of absolute protection in those cases was based upon the nature of the state's activity in compelling the media to publish what it otherwise would not (*Tornillo*, *supra*, 418 U.S. at 256), rather than the premise that the exercise of editorial judgment was immune from post-publication scrutiny. In *Tornillo*, for example, Mr. Justice White, concurring, noted that the decision did “not mean that because government may not dictate what the press is to print, neither can it afford a remedy for libel in any form. . . . [T]he press certainly remains liable for knowing or reckless falsehoods under *New York Times Co. v. Sullivan*. . . .” 418 U.S. at 262.\*

The opinions in *Nebraska Press Assn. v. Stuart*, 427 U.S. 539 (1976) further underline that in determining the scope and depth of the First Amendment protection for media activity it is the nature of the state's attempt to interfere with the activity, rather than the particular media function subject to that interference, which is critical. Chief Justice Burger, writing for the Court, analyzed the long history of First Amendment protections against governmental prior

\* Mr. Justice Brennan, joined by Mr. Justice Rehnquist, concurring, noted that the decision “addresses only ‘right of reply’ statutes and implies no view upon the constitutionality of ‘retraction’ statutes affording plaintiffs able to prove defamatory falsehoods a statutory action to require publication of a retraction,” 418 U.S. at 258.

restraints and the very different questions posed by state action in the form of post-publication inquiries into the content of what was published:

The thread running through all these cases is that prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights. A criminal penalty or a *judgment in a defamation case* is subject to the whole panoply of protections afforded by deferring the impact of the judgment until all avenues of appellate review have been exhausted. Only after judgment has become final, correct or otherwise, does the law's sanction become fully operative.

(427 U.S. at 559; emphasis added)

Mr. Justice Brennan, concurring, also emphasized this distinction. Expressing his view that “there can be no prohibition on the publication by the press of any information pertaining to pending judicial proceedings or the operation of the criminal justice system, no matter how shabby the means by which the information is obtained,” 427 U.S. at 588, he specifically noted the existence of other avenues whereby “shabby” reportage may be challenged:

Of course, even if the press cannot be enjoined from reporting certain information, *that does not necessarily immunize it from civil liability for libel or invasion of privacy or from criminal liability for transgressions of general criminal laws during the course of obtaining that information.*

(*Id.*, n. 15; emphasis added)

The decision below rests upon an analysis of cases in this Court involving protection of the media from certain state activities notwithstanding the express reservations and exclusions of libel suits from the sweep of these decisions. The state action involved herein—a court proceeding to recover damages for libel—clearly is not prohibited

by the First Amendment. *Sullivan* and its progeny permit such proceedings subject to the more restrictive burden of proof and the requirement of actual malice. In permitting such cases, this Court has never limited the anticipated discovery activity of the libel plaintiff on facts directly relevant to matters required to be proven. In short, since defamation actions premised on the actual malice standard are constitutionally permissible, discovery of direct proof of actual malice cannot soundly be said to have an unconstitutional chilling effect on the exercise of First Amendment rights. As stated by Judge Meskill in his dissent:

Under *New York Times v. Sullivan*, 376 U.S. 254 (1964), [Herbert] may prevail if he proves that the defendants acted with "actual malice," that is, knowing or reckless disregard of the truth. The major purpose of this lawsuit, therefore, is to expose the defendants' subjective state of mind—their thoughts, beliefs, opinions, intentions, motives and conclusions—to the light of judicial review. Obviously, such a review has a "chilling" or deterrent effect. It is supposed to. The publication of lies should be discouraged. The discovery by a libel plaintiff of an editor's state of mind will not chill First Amendment activity to any greater extent than it is already being chilled as a result of the very review permitted by *New York Times v. Sullivan*.

(46a-47a)

#### 4. The Balance Previously Struck by This Court Has Been Destroyed.

The decision below represents a basic change in the balance of interests struck by *Sullivan* and its progeny. The Court below has imposed a further and monumental burden on libel plaintiffs by prohibiting direct proof of a concededly critical *Sullivan* issue—actual malice. The subjective nature of the state of mind requisite to establishing actual malice means that only the defendant normally is capable of giving

any direct evidence on this issue; to deprive plaintiffs of the opportunity to discover that evidence from defendant is to overwhelmingly tilt the balance in *Sullivan* libel cases in favor of defendants. In his opinion in the District Court, Judge Haight wrote:

If the malicious publisher is permitted to increase the weight of the injured plaintiff's already heavy burden of proof by a narrow and restricted application of the discovery rules, so that the plaintiff is denied discovery into areas which in the nature of the case lie solely with the defendant, then the law in effect provides an arras behind which malicious publication may go undetected and unpunished. Nothing in the First Amendment requires such a result. (62a-63a)

A further powerful advantage to libel defendants resulting from the decision below is the power given to them to control the direct evidence available at trial on the critical issue of state of mind and to shape it so that only evidence favorable to them will be presented. The prohibition upon plaintiff's inquiring as to defendants' state of mind created by the decision below does not prevent defendants from testifying themselves as to their conclusions, the basis for those conclusions and their intentions when they believe such testimony would be helpful to their case. In fact, in the past, libel defendants during discovery have shown no reluctance to disclose their state of mind under such circumstances.\* See e.g.: *Carson v. Allied News Co.*, 529 F.2d 206, 211-212 (7th Cir. 1976) (reporter's deposition testimony on "basis" for certain statements in the article); *McNair v. The Hearst Corporation*, 494 F.2d 1309, 1311, n.2 (9th Cir. 1974) (publisher's deposition testimony on the

\* Not until the present case has the media indicated any need to protect its "editorial process" from disclosure. As noted by Judge Meskill, "if such a privilege were really necessary to protect the editorial function, we would have heard about it long before now" (51a). Cf., *Branzburg v. Hayes*, *supra*, 408 U.S. at 698-699.

"impression" created by the article); *Vandenburg v. Newsweek, Inc.*, 441 F.2d 378, 380 (5th Cir.), *cert. denied*, 404 U.S. 864 (1971) (deposition testimony as to reporter's initial belief in plaintiff, subsequent disbelief and confirmation of his doubts); *MacNeil v. Columbia Broadcasting System, Inc.*, 66 F.R.D. 22, 25 (D.D.C. 1975) (producer's affidavit on summary judgment motion described his state of mind when he included in the broadcast certain excerpts from a lecture); *F&J Enterprises, Inc. v. Columbia Broadcasting Systems*, 373 F.Supp. 292, 298 (N.D. Ohio 1974) (affidavits by Wallace and a producer that they had no reason to doubt the truth of certain matters because of the reputation of the interviewee and that they did not bear any personal malice or ill will towards plaintiff); *Ragano v. Time, Inc.*, 302 F.Supp. 1005, 1008-1010 (M.D. Fla. 1969), *aff'd*, 427 F.2d 219 (5th Cir. 1970) (deposition testimony of publisher's vice-president as to why known facts were deleted from a story.)\*

Judge Oakes' concurring opinion views the decision of the Court below as "limit[ing] a procedural rule, not . . . alter[ing] the substantive law of libel" (40a, n.28). However, in striking a balance between First Amendment protections and the social values underlying the law of defamation, procedural rules, as well as the substantive law, have been considered by this Court. Thus, the procedural rule governing the nature of the burden of proof to be carried by libel plaintiffs has from *Sullivan* to the present been regarded as one of the important features of the balance drawn by *Sullivan* and its progeny. By adding to the libel plaintiff's burden of proving his case with "convincing clarity," *Sullivan*, *supra*, 376 U.S. at 285-286, a prohibition against obtaining direct proof of the defendant's state of mind, the

\* The media has apparently interpreted the decision below as permitting it, on a case-by-case basis, to determine when to disclose its state of mind and when to remain behind the absolute privilege erected by the decision. See: *The New York Times*, "Libel Case Against CBS Raises Questions About the Release of Data", November 15, 1977, p. 32, col. 6.

decision below does, indeed, rupture the balance which this Court has carefully and arduously constructed since *Sullivan*.\*

Further, to view the decision of the Court below as merely a procedural rule regarding an area of proof is to ignore the self-obvious: where the means of proving a particular matter required for establishing liability is foreclosed, then the liability itself has been nullified.\*\* In view of the heavy burden of proof imposed upon a libel plaintiff, and the subjective test for establishing the requisite state of mind for reckless disregard, the decision of the Court below has effectively eliminated liability for reckless disregard by prohibiting direct proof of the requisite state of mind of the defendant. What this Court has declined to do for the fourteen years since *Sullivan*—grant an immunity to the media for publications made with a reckless disregard of their truth—has been effectively accomplished by the decision of the Court below.

### 5. The Decision Below Has Created Substantial Confusion and Uncertainty in *Sullivan* Libel Cases.

The confusion and potential for abuse arising from the decision of the Court of Appeals furnish additional reasons for this Court to issue the writ of certiorari to review that decision. While the Court below has prohibited compelled disclosure of the "editorial process," the bounds of that

\* Judge Oakes further wrote that limiting plaintiff's discovery "may deprive him of adducing the best proof of malice in the common law sense of ill will toward the plaintiff" (41a, n.31). But plaintiff has been foreclosed from questions regarding defendant's state of mind on matters presented on the Program and conflicting matters excluded from the Program; that is, questions directed not to common law malice but to required actual malice under *Sullivan*.

\*\* Edmund Burke put it simply many years ago: "to refuse evidence is to refuse to hear the cause." 1794, Mr. Edmund Burke, Report to the House of Commons, Debrett's History of Hastings' Trial, 1796, pt. VII, Suppl. p. xxiii, 31 Parl.Hist. 324, quoted in I Wigmore on Evidence § 10, p. 294 (3d Ed. 1940).

process has not been set. The concept of "editorial process" suffers from a spongy quality which may expand to subsume the entire publishing process.\* For example, is a plaintiff foreclosed from all discovery of editorial control and judgment exercised by the reporter in preparing and presenting the publication including: what steps did the reporter determine were necessary to ascertain the truth or falsity of the matters being investigated, which steps were abandoned during the course of the investigation, what means of verification were sought to be followed and what was actually done, how were contradictory materials handled, what factors determined the manner in which contradictory material was treated, how were questions of credibility and reliability of persons interviewed resolved?

The questions triggered by the decision are almost limitless: does the protected area of editorial process include the reporter's pre-investigation conclusion that the only newsworthy publication would be one that portrayed plaintiff as a liar or his conclusion that the only material to be considered for publication is that which supports the particular position of people whose favor the publisher seeks? May a reporter still be asked who he considered interviewing but rejected and who he sought to interview but did not, as well as who he actually interviewed? Can the media, on a case-by-case basis, effectively decide the bounds of the protected area by disclosing some aspects of the editorial process and foreclosing other areas with the claim of privilege?\*\*

\* The decision-making process protected by the decision below has been described as "begin[ning] when a news organization first decides to look into a subject and continu[ing] until the finished product appears in print or is broadcast." *New York Times*, November 15, 1977, *supra*, col. 3.

\*\* Contrary to Chief Judge Kaufman's view (13a; 22a, n.23), the District Court's order does not allow selective disclosure because defendant may disclose any and all other aspects of the editorial

The depth of the protection granted editorial judgment is similarly subject to confusion and abuse. The conclusion that the mere discovery of what occurred during the editorial process so chills First Amendment rights as to require its prohibition necessarily creates a question as to whether any state intrusion regarding that process will be upheld against a First Amendment challenge. Without review by this Court, the decision below may well afford grounds for a finding that government intrusion in the form of a judicial proceeding for damages is constitutionally impermissible where the claim of actual malice is based upon activities occurring during the editorial process. Thus, in addition to the other fundamental changes in the constitutional law of libel effected by the decision below, a major, although ill-defined, area of media activity could be totally removed from any liability that would otherwise arise under *Sullivan* principles.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JONATHAN W. LUBELL  
MARY K. O'MELVENY  
AUDREY J. ISAACS  
*Attorneys for Petitioner*

process in response to plaintiff's discovery of certain aspects of that process. On the other hand, the Court of Appeals decision necessarily results in selective disclosure since the reporter is free to selectively disclose aspects of the editorial process deemed helpful to the defense while plaintiff is prohibited from discovering any other aspects.

# **APPENDIX**

APPENDIX A

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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No. 28—September Term, 1977.

(Argued September 2, 1977     Decided November 7, 1977.)

Docket No. 77-7142

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ANTHONY HERBERT,

*Plaintiff-Appellee,*

v.

BARRY LANDO, MIKE WALLACE, COLUMBIA BROADCASTING  
SYSTEM, INC., ATLANTIC MONTHLY COMPANY,

*Defendants,*

BARRY LANDO, MIKE WALLACE and CBS INC.,

*Defendants-Appellants.*

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Before:

KAUFMAN, *Chief Judge,*  
OAKES and MESKILL, *Circuit Judges.*

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Appeal, pursuant to 28 U.S.C. §1292(b), from an interlocutory order of the United States District Court for the

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Southern District of New York, Charles S. Haight, Jr., *J.*, granting appellees' motion to compel discovery.

Reversed and remanded.

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FLOYD ABRAMS, New York, New York (Dean Ringel, Kenneth M. Vittor and Cahill, Gordon and Reindel; Carleton Eldridge, Jr., Paul Byron Jones, and Coudert Brothers; Richard G. Green, Adria S. Hillman and Green & Hillman, of counsel), *for Defendants-Appellants Barry Lando, Mike Wallace, and CBS Inc.*

JONATHAN W. LUBELL, New York, New York (Mary K. O'Melveny, Samuel Estreicher, and Cohn, Glickstein, Lurie, Ostrin & Lubell, of counsel), *for Plaintiff-Appellee, Anthony Herbert.*

RICHARD SCHMIDT, JR., Washington, D.C. (Cohn and Marks, of counsel); DAN PAUL, Miami, Florida (Paul & Thomson, of counsel); JAMES C. GOODALE, New York, New York; DANIEL FELDMAN, Chicago, Illinois (Isham, Lincoln & Beale, of counsel); CORYDON B. DUNHAM, New York, New York; J. LAURENT SCHARFF, Washington, D.C. (Pierson, Ball & Dowd, of counsel), filed a brief for the American Society of Newspaper Editors, Chicago Sun-Times, Chicago Daily News, The Miami Herald Publishing Co., National Broadcasting Company, Inc., The New York Times Company, and Radio Tele-

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vision News Directors Association, *Amici Curiae.*

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KAUFMAN, *Chief Judge:*

The seemingly narrow issue before us—the scope of protection afforded by the First Amendment to the compelled disclosure of the editorial process—has broad implications. Called upon to decide whether, and to what extent, a public figure bringing a libel action may inquire into a journalist's thoughts, opinions and conclusions in preparing a broadcast, we must address initially the fundamental relationship between the First Amendment guarantee of a free press and the teaching of *New York Times v. Sullivan*, 376 U.S. 254 (1964). In accommodating both these interests within our constitutional scheme, we find that due regard to the First Amendment requires that we afford a privilege to disclosure of a journalist's exercise of editorial control and judgment.

I

Almost two centuries ago, James Madison decried the Sedition Act of 1798 as a basic departure from our nation's commitment to a free and untrammelled press. He wrote,

Among those principles deemed sacred in America, among those sacred rights considered as forming the bulwark of their liberty, which the government contemplates with awful reverence and would approach

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only with the most cautious circumspection, there is no one of which the importance is more deeply impressed on the public mind than the liberty of the press.<sup>1</sup>

The force of his words has not diminished over time. We still recognize that an unrestrained press plays a vital role in the marketplace of ideas and that, without active trade in that marketplace, democracy cannot survive. Cf. *Garrison v. Louisiana*, 379 U.S. 74-75 (1964).<sup>2</sup>

Invoking the broad words of the First Amendment, the Supreme Court has never hesitated to forge specific safeguards to insure the continued vitality of the press. It has repeatedly recognized the essentially tripartite aspect of the press's work and function in: (1) acquiring information,<sup>3</sup> (2) 'processing' that information and (3) disseminating the information. The Supreme Court was aware that if any link in that chain were broken, the free flow of information inevitably ceases.<sup>4</sup>

1 VI Writings of James Madison, 1790-1802, p. 335 (Hunt ed. 1906).

2 The notion that the free exchange of information is vital to a democracy is a longstanding principle of the First Amendment. See *Stromberg v. California*, 283 U.S. 359, 369 (1931); *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring). See also A. Meiklejohn, *Free Speech and Its Relation to Self-Government*, 88-9 (1948).

3 The support given by the press to the passage of "right to know" and "open meeting" statutes is based on its vital need to acquire information. See Note, *Freedom of Information: The Statute and the Regulations*, 56 Georgetown L.J. 56 (1967); Note, *Open Meeting Statutes: The Press Fights for the Right to Know*, 75 Harv. L. Rev. 1199 (1962).

4 See generally Note, *The Rights of the Public and the Press to Gather Information*, 87 Harv. L. Rev. 1505 (1974).

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The dissemination of news has long been accorded constitutional protection.<sup>5</sup> In *Near v. Minnesota*, 283 U.S. 697 (1931), Chief Justice Hughes, writing for the Court, struck down a Minnesota statute which allowed the state to enjoin the publication of newspapers containing 'malicious, scandalous, and defamatory' matter. The Chief Justice noted that prior restraints on the press were impermissible, notwithstanding the possibility that the information suppressed was libelous. In particular, the fundamental obligation of the press to act as a fourth branch in disclosing official misconduct was stressed:

The administration of government has become more complex, the opportunities for malfeasance and corruption have multiplied, crime has grown to most serious proportions, and the danger of its protection by unfaithful officials . . . emphasizes the primary need of a vigilant and courageous press. *Id.* at 719-20.

5 The First Amendment cases which protect picketing exhibit like concern with the need to disseminate information. In a landmark case, *Thornhill v. Alabama*, 310 U.S. 88 (1940) Justice Murphy wrote,

In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution . . . Every expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group in society. But the group in power at any moment may not impose penal sanctions on peaceful and truthful discussion on matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests. *Id.* at 98-99.

See also *Lovell v. Griffin*, 303 U.S. 44 (1938) (an ordinance prohibiting the distribution of "circulars, handbills, advertising, or literature of any kind" invalid on its face as a prior restraint); *Martin v. Struthers*, 319 U.S. 141 (1943) (prohibition of door-to-door canvassing for purposes of disseminating religious literature invalid as a prior restraint).

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The tenet expressed in *Near* that prior restraints on publication will not lightly be tolerated has, time and time again, been reiterated under circumstances which accentuate Chief Justice Hughes's concerns. See, e.g., *New York Times v. United States*, 403 U.S. 713 (1971).<sup>6</sup>

Such anticipatory censorship is not even justified by the presence of a countervailing constitutional interest such as an individual's Sixth Amendment right to a fair trial.<sup>7</sup> Before imposing a gag order, the judges have been admonished that they must carefully consider alternative methods to mitigate the effects of pre-trial publicity. Change of venue and other procedures have been suggested. *Nebraska Press Association v. Stuart*, 427 U.S. 539, 562 (1976).

Nor has the Supreme Court shown any hesitation to invalidate restraints on the press which do not follow conventional patterns where it finds the free flow of information imperiled. In *Grosjean v. American Press Co.*, 297 U.S. 233 (1936), the Court struck down a tax imposed by the State of Louisiana on newspaper advertisements because it was graduated to reflect circulation levels.<sup>8</sup> The Court opined that such a tax would lower advertising

6 See also *Teitel Film Corp. v. Cusack*, 390 U.S. 139 (1968); *Freedman v. Maryland*, 380 U.S. 51 (1965). See, for a historical overview of the prior restraint doctrine, Emerson, *The Doctrine of Prior Restraint*, 20 *Law & Contemp. Prob.* 648 (1955).

7 Of course, the court can exercise its authority to maintain an atmosphere of impartiality and calm in the courtroom. See *Estes v. Texas*, 381 U.S. 532 (1965). However, the exercise of such control in no way implies a right to abridge expression itself.

8 The Supreme Court unanimously held the statute invalid. Justice Sutherland, writing for the Court, analogized the statute to pre-Revolutionary "taxes on knowledge" designed to "prevent, or curtail the opportunity for, the acquisition of knowledge by the people in respect to their governmental affairs." 297 U.S. 245-46.

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revenues and restrict circulation. *Id.* at 244-5.<sup>9</sup> Even the one governmental control—antitrust legislation—that has long been applied to the press and does not contravene the First Amendment has been justified by its instrumental role in insuring the broad distribution of news:

The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

The acquisition of newsworthy material stands at the other pole of the press's function. Freedom to cull information is logically antecedent and necessary to any effective exercise of the right to distribute news. Indeed, the latter prerogative cannot be given full meaning unless the former right is recognized. See Note, *The Right of The Press to Gather Information*, 71 *Col. L. Rev.* 838 (1971).

The Supreme Court has acknowledged this compelling need.<sup>10</sup> In *Branzburg v. Hayes*, 408 U.S. 655 (1972), the

9 For a collection of materials on the problem of taxation of the press, see T. Emerson, *Political and Civil Rights in the United States*, 602-4 (3d ed. 1967). Many state court decisions have followed *Grosjean*. See, e.g., *Mayor of Baltimore v. A.S. Abell Co.*, 218 Md. 273, 287, 145 A.2d 111, 118 (1958).

10 While we discuss only the articulation of this right to gather information as it pertains to the press, the Supreme Court has acknowledged a similar right with respect to free speech. In *Martin v. City of Struthers*, 319 U.S. 141 (1943), the Court invalidated a municipal ordinance forbidding door-to-door distribution of handbills as violative of the First Amendment rights of both the recipients and the distributors.

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Court recognized the right of the press to gather information, since “without some protection for seeking out the news, freedom of the press could be eviscerated.” *Id.* at 681. Justice Powell, in a concurring opinion, articulated the principle that news gathering is afforded constitutional protection even in the rare case where a reporter was directed to disclose his sources to a grand jury. He noted that a reporter would not be required to furnish information to a grand jury bearing only a remote and tenuous relationship to the subject matter of its investigation. *Id.* at 711. See also Goodale, *Branzburg v. Hayes and the Developing Privilege for Newsmen*, 26 Hastings L. J. 709 (1975).<sup>11</sup>

This court has elaborated on the privilege established by *Branzburg*. In *Baker v. F & F Investment*, 470 F.2d 778, 782-3 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973), we held that a reporter did not have to disclose the source of an article he had written about blockbusting in Chicago, although subpoenaed to do so in a class action charging racial discrimination. We noted that “there are circumstances . . . in which the public interest in non-disclosure of a journalist’s confidential sources outweighs the public and private interest in compelled testimony.” *Id.* at 782. The nature of that public interest was clear: the stream of

<sup>11</sup> Although the Court in *Branzburg* expressed the need to protect journalists’ sources, it did not suggest that the press enjoyed a special right of access to information not generally available. See also *Saxbe v. The Washington Post Co.*, 417 U.S. 843 (1974) (press does not have a constitutional right to interview prison inmates). However, Justice Stewart, who wrote the opinion for the Court in *Saxbe*, subsequently noted that the freedom of the press is a structural provision of the Constitution, and therefore unique. Stewart, “*Of the Press*,” 26 Hastings L.J. 631 (1975).

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information would rapidly run dry if confidential sources, fearing the disclosure of their identities, remained silent.<sup>12</sup>

The constitutional protections afforded the dissemination and acquisition of information has inevitably led the Supreme Court to recognize that the editorial process must equally be safeguarded. The media is not a conduit which receives information and, senselessly, spews it forth. The active exercise of human judgment must transform the raw data of reportage into a finished product. The Supreme Court cases which grant protection to the editor so shaping the news are unequivocal in their terms. In *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), the Court unanimously held that a newspaper could not be compelled by the state to accept editorial replies. The Court recognized that the treatment of public issues and officials—whether fair or unfair—constituted the exercise of editorial control and judgment, and that the existence of a right of reply statute would unconstitutionally burden an

<sup>12</sup> Of course, our holding in *Baker* did not depend upon either the New York or Illinois statutes. There, as in *Garland v. Torre*, 259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958), the First Amendment compelled our conclusion. Under similar circumstances, the disclosure of confidential sources has been privileged. In *Cervantes v. Time, Inc.*, 464 F.2d 986, 992-93 (8th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973), the court held that a publisher was not required to disclose his sources since the plaintiff’s libel action was not likely to succeed. See also *Apicella v. Mac Neil Laboratories, Inc.*, 66 F.R.D. 78 (E.D.N.Y.) (court refused to order the editors of a medical newsletter to disclose their confidential sources, although those sources possessed information relevant to plaintiffs’ allegations of adverse drug effects). But see *Carey v. Hume*, 494 F.2d 631 (D.C. Cir. 1974), *cert. dismissed*, 417 U.S. 938 (1974) (court ordered disclosure of a confidential source where the allegedly libelous statement was based *entirely* on confidential sources and the plaintiff had no way of proving falsity or reckless disregard without knowledge of the identity of those sources). See generally Comment, *Newsmen’s Privilege Against Compulsory Disclosure of Sources in Civil Suits—Toward an Absolute Privilege?*, 45 U. Colo. L. Rev. 173 (1973).

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editor's exercise of judgment in choosing whether or not to print newsworthy material. *Id.* at 257.

The Court in *Columbia Broadcasting System v. Democratic National Committee*, 412 U.S. 94 (1973) had, a year earlier, presaged the unqualified statement of *Tornillo*.<sup>13</sup> In holding that broadcasters were not required by the First Amendment to accept paid political advertisements, the Court observed: "... For better or worse, editing is what editors are for; and editing is selection and choice of material." Specifically, in addressing the issue of whether broadcaster's decisions constituted state action, Chief Justice Burger noted,

... it would be anomalous for us to hold, in the name of promoting the constitutional guarantees of free expression, that the day-to-day editorial decisions of broadcast licensees are subject to the kind of restraints urged by respondents. To do so in the name of the First Amendment would be a contradiction. *Id.* at 120-1.

<sup>13</sup> The Court's active consideration of the broadcast medium began, of course, with *Red Lion Broadcasting v. FCC*, 395 U.S. 367 (1969). There, the Supreme Court rejected the broadcaster's challenge, on conventional First Amendment grounds, to the fairness doctrine and to the FCC's "right of reply" rules. The rationale for the Court's holding is strikingly similar to that used in upholding the application of the antitrust laws to the press. Justice White observed,

Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish. . . . It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which the truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee. . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. *Id.* at 388-90.

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It is clear from what we have said that newsgathering and dissemination can be subverted by indirect, as well as direct, restraints. It is equally manifest that the vitality of the editorial process can be sapped too if we are not vigilant. The unambiguous wisdom of *Tornillo* and *CBS* is that we must encourage, and protect against encroachment, full and candid discussion within the newsroom itself. In the light of these constitutional imperatives, the issue presented by this case is whether, and to what extent, inquiry into the editorial process, conducted during discovery in a *New York Times v. Sullivan* type libel action, impermissibly burdens the work of reporters and broadcasters.<sup>14</sup>

## II

*New York Times v. Sullivan*, applying constitutional principles to the common law of libel, empowered a public figure to vindicate his reputation in an action if he could establish that the statements at issue were knowingly false, or made in reckless disregard of the truth. *New York Times v. Sullivan*, 376 U.S. at 279-80 (1964); *Curtis Publishing Co. v. Butts*, 388 U.S. 162-5, 170-2 (1967); *Gertz v. Robert Welch*, 418 U.S. 323, 335 n. 6 (1974); *Goldwater v. Ginzburg*, 414 F. 2d 324 (2d Cir. 1969), *cert. denied*, 396

<sup>14</sup> Appellants, in their brief, succinctly frame the issue before us:

What effect should be given to the First Amendment protection of the press with respect to its exercise of editorial judgment in pre-trial discovery in a libel case governed by *New York Times v. Sullivan*, 376 U.S. 254 (1964)?

On this appeal, appellants do not ask that we review the specific discovery rulings of the District Court. They seek only that we articulate a general principle delineating the First Amendment considerations applicable to discovery of editorial judgment under *Sullivan*. Brief for Appellants at 7-8.

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U.S. 1049 (1970). Later decisions instructed that the *Sullivan* standard required a subjective inquiry into the defendant's state of mind. *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).<sup>15</sup>

While *Sullivan* left a narrow area for public figures to maintain a libel action, limiting decisions have further refined *Sullivan* when viewed in the context of the First Amendment.<sup>16</sup> The opinions applying these additional constraints do so in recognition of the constitutional safeguards cloaking the press, and the need to protect editors and broadcasters. They speak with the same voice as do *CBS* and *Tornillo*.

For example, in *Buckley v. Littel*, 538 F. 2d 882 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977), we held that statements of opinion could not afford a basis for recovery in a libel case. The reason for this circumscription of libel was clear: the expression of personal opinions and views was fundamental to the need for vigorous debate. Indeed, it is part and parcel of the paramount function of the press—the dissemination of information. And, just last term, in *Edwards v. New York Times Co.*, 556 F. 2d 113 (2d Cir. 1977), we held that a newspaper could not libel an indi-

<sup>15</sup> Appellees concede that the instant libel action is governed by *Sullivan*. Brief for appellee at 16. Hence, the question which the Supreme Court has recently found so troublesome, the characterization of 'public figure' in libel suits, is not before us. See *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971) (*Sullivan* standard extended to private individual involved in event of public or general interest); but see *Gertz v. Robert Welch*, 418 U.S. 323 (1974) (Chicago attorney engaged in prominent trial not deemed to be a public figure).

<sup>16</sup> *Sullivan* has been further refined, substantively and procedurally. For example, where it is unlikely that the plaintiff will succeed on the merits of his claim, courts have been more willing, within the area of libel than elsewhere, to grant summary judgment. See, e.g., *Guitar v. Westinghouse Electric Corp.*, 396 F. Supp. 1042, 1053 fn.16 (S.D.N.Y.), and cases cited therein.

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vidual when the reporter engaged in the neutral reportage of newsworthy material. Our concern there, too, was that the press be unhampered in bringing news to the public.<sup>17</sup>

These reciprocal developments in the law of libel and in freedom of the press narrowly define our task: we must permit only those procedures in libel actions which least conflict with the principle that debate on public issues should be robust and uninhibited. If we were to allow selective disclosure of how a journalist formulated his judgments on what to print or not to print, we would be condoning judicial review of the editor's thought processes. Such an inquiry, which on its face would be virtually boundless, endangers a constitutionally protected realm, and unquestionably puts a freeze on the free interchange of ideas within the newsroom. A reporter or editor, aware that his thoughts might have to be justified in a court of law, would often be discouraged and dissuaded from the creative verbal testing, probing, and discussion of hypotheses and alternatives which are the *sine qua non* of responsible journalism. Indeed, the *ratio decidendi* for *Sullivan's* restraints on libel suits is the concern that the exercise of editorial judgment would be chilled.

### III.

With these principles set forth, we proceed to traverse the facts before us in some detail. In March 1971, Colonel

<sup>17</sup> In *Edwards*, we stated,

We believe that the interest of a public figure in the purity of his reputation cannot be abstracted that vital pulse of ideas and intelligence on which an informed and self-governing people depend. It is unfortunate that the exercise of liberties so precious as freedom of speech and of the press may sometimes do harm that the state is powerless to recompense, but this is the price that must be paid for the blessings of a democratic way of life. *Id.* at 122.

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Anthony Herbert achieved national importance when he formally charged his superior officers, Brigadier General John W. Barnes and Colonel J. Ross Franklin, with covering up war crimes in Vietnam. Herbert claimed, in documents filed with the U.S. Army Criminal Investigation Division (CID), that he had witnessed numerous atrocities while commanding a battalion of the 173rd Airborne Brigade. The most horrifying involved the murder of four prisoners of war by South Vietnamese police in the presence of an American advisor, who callously failed to intervene. Since those killings allegedly occurred on February 14, 1969, Herbert dubbed them the "St. Valentine's Day Massacre."

Herbert claimed to have reported all atrocities immediately to Colonel Franklin, deputy commander of the 173rd Airborne, at Brigade Headquarters in Vietnam, and to have brought several to the attention of the Brigade's commander, General Barnes. But, Herbert alleged, neither was interested in investigating the incidents. When Herbert persisted in pressing his charges, he said that he was abruptly relieved of his command, a determination that was subsequently affirmed by a military appeals tribunal. His removal as battalion commander was attributed to a poor efficiency report authored by Colonel Franklin, which accused Herbert of having "no ambition, integrity, loyalty or will for self-improvement."

Herbert's sudden fall from grace surprised many observers. His long career in the military had been exemplary; under his strong leadership, the second battalion had exhibited extraordinary prowess in battle. His military acumen had earned Herbert one Silver and three Bronze stars, and he had recently been recommended to receive the Distinguished Service Cross.

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Herbert's story fascinated an American public that was increasingly becoming disenchanted with the Vietnam War. In July 1971, he was interviewed by Life Magazine; that September, James Wooten of the New York Times wrote an article favorable to Herbert titled "How a Supersoldier Was Fired From His Command." Interviews with the television personality Dick Cavett followed which, according to Cavett, elicited a level of viewer response unmatched by any other single program. In October 1971, Congress became embroiled in the 'Herbert affair' when Rep. F. Edward Hebert, Chairman of the Armed Services Committee, convinced the Army to remove Herbert's poor efficiency report from his military record.

The Army also thoroughly investigated Herbert's charges of war crimes and, in October 1971, exonerated General Barnes. Armed with this new information, reporters began for the first time to critically examine the veracity of Herbert's story. During this period of intense public interest, Herbert announced his retirement from the service. He cited, as the reason for his decision, incessant harassment by the military because of his disclosures.

Barry Lando, an associated producer of the CBS Weekend News, was one of the many individuals interested in the Herbert story. He interviewed Herbert in June 1971 and later produced a laudatory report which was televised on July 4, 1971 over the CBS network. A year later, Lando had become a producer for CBS's documentary news program, "60 Minutes." He decided to investigate both Herbert's military career and his charges of cover-up for a comprehensive broadcast on the ensuing controversy. Lando interviewed not only Herbert, Franklin and Barnes, but questioned others, both in and out of the military, who could corroborate Herbert's claims that he had reported

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war crimes, and that the military had engaged in a systematic whitewash. Indeed, some of the leads which Lando pursued may have been supplied by Herbert himself during their repeated and extensive conversations. Lando focused on particular allegations. He spent some time in attempting to assay whether Herbert had, in fact, reported the St. Valentine's Day Massacre to Franklin in Vietnam on February 14, 1969. Since Franklin protested that he was returning from Hawaii on that date, Lando concentrated on this point. Lando obtained Franklin's hotel bill and a cancelled check in payment of that bill, and interviewed others who could verify Franklin's activities on the crucial days. Lando also questioned Captain Bill Hill, upon whom Herbert relied to substantiate his story. When Hill recalled that Herbert reported war crimes to someone, he could not say with total certainty that Franklin was the individual.

Other allegations were also considered. Lando investigated Herbert's activities during the eighteen-month period between his relief from command and the filing of formal war crimes charges to determine whether Herbert had apprised other officers in Vietnam of his accusations. In particular, Lando interviewed the highest ranking military lawyer and judge in Vietnam at the time, Colonel John Douglass, who emphatically controverted Herbert's assertion that war crimes had been brought to his attention. Lando also elicited from Kenneth Rosenbloom, the military attorney and investigator who conducted the Army's inquiry into Herbert's allegations, the view that the military's handling of the charges was beyond reproach.

Lando also questioned soldiers who had served under Herbert to determine his qualities as commander. One of these, Sergeant Bruce Potter, reported occasions upon

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which Herbert had countenanced the commission of war crimes. Potter recounted, for example, an incident in which Herbert had thrown a sand bag out of a helicopter to frighten a war prisoner on the ground into thinking it was a fellow prisoner who had been ejected.

During this period, Lando received an uncorrected proof of "Soldier," a book written by Herbert in collaboration with James Wooten of the New York Times. Although several of those interviewed by Lando attested to the verity of many of Herbert's reports, others did not. Thus, Herbert wrote that Captain James Grimshaw had once attempted to drive certain Viet Cong soldiers from a cave without injuring female civilians and children by valiantly entering their hiding place alone. Grimshaw, however, denied the incident had occurred.

Lando's research culminated in the telecast of "The Selling of Colonel Herbert" on February 4, 1973. That evening, the American people were presented with a fallen hero. The presentation on the air initially juxtaposed Herbert's claims and the denials of Franklin and Barnes that Herbert ever reported war crimes, and then considered in detail five aspects of the Herbert affair:

- (1) Lando's doubts that Franklin was even present in Vietnam to hear of the St. Valentine's Day Massacre;
- (2) Colonel Douglass's adamant denial that war crimes had been reported to him;
- (3) Kenneth Rosenbloom's defense of the Army's investigation;
- (4) Bruce Potter's recount of the helicopter incident; and

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- (5) James Grimshaw's flat contradiction of his alleged heroism in the cave.

While the existence of information corroborative of Herbert's claims was alluded to on the broadcast, the program as a whole clearly cast doubt upon all of Herbert's allegations. The telecast concluded with a plea that the Army make its records public to the end of conclusively settling the imbroglio.

Lando subsequently recounted his research in an Atlantic Monthly article titled "The Herbert Affair." The article, like the broadcast, cast serious doubts upon Herbert's veracity and concluded that the American press had been deluded by Herbert's story.

Herbert responded to the CBS broadcast and Lando's article by instituting a defamation action against CBS, Barry Lando, Mike Wallace, the correspondent for the program, and Atlantic magazine, alleging \$44,725,000 in damages for injury to his reputation and impairment of his book 'Soldier' as a literary property. Herbert contended that Lando deliberately distorted the record through selective investigation, "skillful" editing, and one-sided interviewing, and that he was deliberately depicted as evasive in the interview. In addition, Herbert claimed Atlantic republished Lando's statements knowing that they were false. Lando, Wallace and CBS countered that the publications represented a fair and accurate report of public proceedings, broadcast in good faith without malice, and, in addition, that the program and article were protected by the First and Fourteenth Amendments.

Once the issue was joined, Herbert commenced discovery of Lando, Wallace and CBS. The deposition of Lando required twenty-six sessions and lasted for over a year. The

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sheer volume of the transcript—2903 pages and 240 exhibits—is staggering. Lando answered innumerable questions about what he knew, or had seen; whom he interviewed; intimate details of his discussions with interviewees; and the form and frequency of his communications with sources.<sup>18</sup> The exhibits produced included transcripts of his interviews; volumes of reporters notes; videotapes of interviews; and a series of drafts of the "60 Minutes" telecast. Herbert also discovered the contents of pre-telecast conversations between Lando and Wallace as well as reactions to documents considered by both. In fact, our close examination of the twenty-six volumes of Lando's testimony reveals a degree of helpfulness and cooperation between the parties and counsel that is to be commended in a day when procedural skirmishing is the norm. Lando, however, balked when asked a small number of questions relating to his beliefs, opinions, intent and conclusions in preparing the program.<sup>19</sup> He claimed that any response would be inconsistent with the protections afforded the editorial process by the First Amendment. These assertedly objectionable inquiries can be grouped into five categories:

1. Lando's conclusions during his research and investigations regarding people or leads to be pursued, or

<sup>18</sup> Much of Lando's testimony concerned the volumes of his notes which were produced. Lando painstakingly deciphered and explained the short, and often cryptic, remarks taken down during interviews. Lando's explanations frequently led to lengthy discussions regarding the subject matter of his discussions with third persons.

<sup>19</sup> Here, too, counsel exhibited a remarkable degree of cooperation. In advance of Herbert's Rule 37 motion to compel discovery, Judge Haight suggested that the parties might voluntarily reach agreement concerning many of the objectionable questions. A substantial number of questions were withdrawn as a result, as were objections to a large number of others.

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- not to be pursued, in connection with the '60 Minutes' segment and the Atlantic Monthly article;
2. Lando's conclusions about facts imparted by interviewees and his state of mind with respect to the veracity of persons interviewed;
  3. The basis for conclusions where Lando testified that he did reach a conclusion concerning the veracity of persons, information or events;
  4. Conversations between Lando and Wallace about matter to be included or excluded from the broadcast publication; and
  5. Lando's intentions as manifested by his decision to include or exclude certain material.

Faced with Lando's claim that the constitution immunized his mental process from discovery, Herbert sought an order, pursuant to Rule 37(a)(2) of the Federal Rules of Civil Procedure, compelling Lando to respond to his inquiries.<sup>20</sup> Judge Haight, after observing that the case

<sup>20</sup> Rule 37(a) provides that

A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery . . .

A motion under Rule 37(a) implements the provisions of Rule 26(b)(1):

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. . . . It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Further, Rule 26(c) protects the party against whom discovery is sought by empowering the district court to issue a protective order to:

protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. . . .

In compelling discovery, Judge Haight applied these rules but did not consider whether inquiry into editorial process would be oppressive or unduly burdensome.

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was one of first impression, concluded that Herbert's discovery of the journalist's state of mind should be broad and unrestricted. He reasoned that a public figure bore a heavy burden of proving that an alleged libeler acted with actual malice or in reckless disregard of the truth, and that the necessarily subjective nature of the libel standard fully justified inquiry into Lando's thought processes.

Judge Haight dismissed Lando's contention that the machinations of the editorial mind were constitutionally sacrosanct and immune from the probing of a libel plaintiff.<sup>21</sup> The critical importance of the issue, whether the First Amendment erects any barriers to discovery of the editorial process, compelled this court to permit the instant interlocutory appeal, pursuant to 28 U.S.C. §1292(b), of the district court's order that Lando answer Herbert's inquiries.

IV.

We have undertaken this extensive review of the facts to underscore that the lifeblood of the editorial process is human judgment. The journalist must constantly probe and investigate; he must formulate his views and, at every step, question his conclusions, tentative or otherwise. This is the process in which Barry Lando was engaged and his

<sup>21</sup> Judge Haight concluded that *Sullivan* had already struck the balance between First Amendment rights and the protection of reputation. He argued that, since *Sullivan* allowed for a libel recovery upon a showing of actual malice or reckless disregard, all discovery leading to admissible evidence was proper. He dismissed out of hand appellants' contention that *Tornillo* and *CBS* mandated additional First Amendment protections:

I find no substance in the argument defendants based upon the "editorial judgment" concept. . . . These cases (*CBS*, *Tornillo*, *Bransburg*) have nothing to do with the proper boundaries of pre-trial discovery in a defamation suit alleging malicious prosecution.

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efforts suggest the nature and scope of the reporter's task in shaping and refining a mass of facts into a finished product.<sup>22</sup>

Herbert seeks to scrutinize this very process. Of course, he has already discovered what Lando knew, saw, said and wrote during his investigation. As we noted before, the deposition of Lando produced a massive transcript documenting in minute detail the course of Lando's research. The jury is free to infer from Lando's use and application of the extensive materials discovered and, equally important, from the failure to heed certain contradictory information. If it chooses to do so (and as we have indicated in footnote 22, we express no views on the merits of the controversy), it can find that Lando acted with actual malice or in reckless disregard of the truth.

Now, Herbert wishes to probe further and inquire into Lando's thoughts, opinions and conclusions. The answers he seeks strike to the heart of the vital human component of the editorial process. Faced with the possibility of such an inquisition, reporters and journalists would be reluctant to express their doubts. Indeed, they would be chilled in the very process of thought. As we expressed above, the tendency would be to follow the safe course of avoiding contention and controversy—the antithesis of the values fostered by the First Amendment.

We cannot permit inquiry into Lando's thoughts, opinions and conclusions to consume the very values which the *Sullivan* landmark decision sought to safeguard.<sup>23</sup> It

<sup>22</sup> In so characterizing Lando's research, we do not mean to express any view as to the merits of the controversy.

<sup>23</sup> Selective inquiry into the reporter's thoughts can be far worse than the discovery of all aspects of his mental process. In plumbing only particular facets of the reporter's mind, the libel plaintiff is more likely to distort the nature of the editorial process.

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cannot be gainsaid that were a legislative body to require a journalist to justify his decisions in this matter, such an intrusion would not be condoned. That this invasion on First Amendment rights is about to be effected by an allegedly libelled plaintiff does not reduce the grave implications for the vitality of the editorial process which the Supreme Court and this court have recognized must be guarded zealously. It makes little sense to afford protection with one hand and take it away with the other. Accordingly, we remand to the district court for an evaluation of the interrogatories in light of the principles articulated in this opinion.

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OAKES, *Circuit Judge* (concurring):

I concur with much of Chief Judge Kaufman's opinion, his broad answer to the certified question and the overall judgment. Because this case breaks new ground in an area of utmost importance, it warrants setting forth the somewhat different First Amendment analysis I use to reach the ultimate result, even at the risk of some repetition. In the process I will also set forth my own slightly more detailed views on the approach that should be taken by the district court on remand, for whatever guidance they may supply.

I

As we know, in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the Supreme Court "constitutionalized" the law of defamation by subjecting it to requirements deriving from and implicit in the First Amendment.<sup>1</sup> In

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<sup>1</sup> See *Restatement (Second) of Torts*, Special Note at 3 (Tent. Draft No. 21, 1975); Eaton, *The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer*, 61 Va. L.

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cases involving publication of matter pertaining to public affairs and involving public officials—as this case does<sup>2</sup>—to be liable a defendant must have acted with “actual malice”<sup>3</sup> as constitutionally defined. *Sullivan* contemplates not only that the alleged defamatory statements are false but that the libel defendant knew that they were false or made them with reckless disregard of their truth or falsity. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974); *New York Times Co. v. Sullivan*, *supra*, 376 U.S. at 279-80. The appropriate standard is whether “the defendant in fact entertained serious doubts as to the truth of his publication.” *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). In this respect, ill will toward the plaintiff, bad motive, hatred, spite or even desire to injure—malice in the traditional as opposed to the constitutional sense—is not involved. See *Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin*, 418 U.S. 264, 281

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Rev. 1349, 1364-1408 (1975); Robertson, *Defamation and the First Amendment: In Praise of Gertz v. Robert Welch, Inc.*, 54 Tex. L. Rev. 199, 199 (1976). For an early explication of the change of the tort law of defamation into a subject of constitutional dimension, see Kalven, *The New York Times Case: A Note on “the Central Meaning of the First Amendment,”* 1964 Sup. Ct. Rev. 191.

2 It involves the conduct of the Vietnam war, a public issue, *New York Times Co. v. United States*, 403 U.S. 713, 724 (1971) (Douglas, J., concurring), and a United States Army officer who was a public official and employee, who by his charges against the military establishment unquestionably made himself a public figure, thereby inviting “attention and comments.” See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974); *Buckley v. Littell*, 539 F.2d 882, 885-86 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977).

3 The phrase “actual malice” is a “term of art” that evidently is now “studiously avoided” by the Supreme Court. See Eaton, *supra* note 1, at 1370 n.87. However, it is a shorthand phrase for *Sullivan*’s “knowing falsity or reckless disregard of truth” test. It is used here in its accurate sense.

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(1974); *Buckley v. Littell*, 539 F.2d 882, 889 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977).

This case presents the broad question whether in a case involving allegations of actual malice discovery should be “liberal” as provided generally by the Federal Rules of Civil Procedure<sup>4</sup> and as held by the trial judge, or should be restricted in certain ways. The restriction urged on us specifically is that matters of “editorial process”<sup>5</sup> should not be discoverable at all or only under certain limitations. The exact relief requested remains somewhat unclear since appellant’s brief would have us remand to the district court “with instructions for that Court to redetermine the issues raised by the motions [pursuant to Rule 37 of the Federal Rules of Civil Procedure], giving due regard to First Amendment considerations as set forth by this Court.” Brief for Appellant at 8, 32-33. Within these broad parameters we are invited in this extraordinary though not unique interlocutory appeal on a discovery order,<sup>6</sup> to set some limits in *Sullivan* cases on the untrammelled, roving discovery that has become so prevalent in other types of litigation in today’s legal world. Not

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4 Fed. R. Civ. P. 26(b)(1).

5 While the area for which appellant seeks protection, “editorial process,” may initially seem vague, guidance is provided by Chief Justice Burger’s statements in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974), and in *Columbia Broadcasting Sys., Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 124-25 (1973). See text accompanying note 37 *infra*. The specific areas of inquiry sought by the plaintiff are set out in Chief Judge Kaufman’s opinion, *ante* at 238-39.

6 See *Socialist Workers Party v. Attorney General*, No. 77-3041, slip op. at 6627 (2d Cir. Oct. 11, 1977) (no interlocutory review of discovery order absent certification, “manifest abuse of discretion,” or legal question of “extraordinary significance”); *cf. Time, Inc. v. McManey*, 406 F.2d 565, 566 (5th Cir.) (interlocutory review of a denial of summary judgment appealable because of critically important First Amendment issue), *cert. denied*, 395 U.S. 922 (1969).

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without the doubt that any venture on untrod paths may bring, I am willing to join in accepting the invitation.

At the outset, there are familiar landmarks. There is, for example, no necessary internal inconsistency between a First Amendment limitation on compelled discovery in *Sullivan* cases on the one hand and liberal rules of civil procedure on the other.<sup>7</sup> The rules of civil procedure expressly contemplate limitations in at least two areas. First, where discovery would result in “oppression” of or “undue burden” on a person whose deposition is being taken, a court may limit or even forbid discovery.<sup>8</sup> Certainly, therefore, a plaintiff’s attempt to prove actual malice may be restrained where the discovery he seeks satisfies the oppression standard of Rule 26(c). And second, Rule 26(b)(1) excepts privileged matters from compelled discovery.<sup>9</sup> Not surprisingly, a privilege insulating journalists’ confidential sources from compelled discovery in civil litigation has been recognized by this court and others. *Baker v. F & F Investment*, 470 F.2d 778 (2d Cir. 1972) (civil rights litigation), *cert. denied*, 411 U.S. 966 (1973); *Cervantes v. Time, Inc.*, 464 F.2d 986 (8th Cir. 1972) (public figure libel litigation), *cert. denied*, 409 U.S. 1125 (1973); *see Apicella v. McNeil Laboratories, Inc.*, 66 F.R.D. 78 (E.D.N.Y. 1975); *Loadholtz v. Fields*, 389 F. Supp. 1299 (M.D. Fla. 1975). *But see Dow Jones & Co. v. Superior Court*, 303 N.E.2d 847 (Mass. 1973). The limitation on discovery of journalists’ sources suggests by analogy that other First Amendment limitations on discovery in

7 I do not mean to suggest that Judge Haight in his scholarly opinion below relied simply on the discovery rules.

8 Fed. R. Civ. P. 26(c); *cf. Branzburg v. Hayes*, 408 U.S. 665, 707-08 (1972) (grand jury harassment of press impermissible).

9 Fed. R. Civ. P. 26(b)(1).

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*Sullivan* cases may be similarly appropriate. The focus of inquiry thus becomes whether the First Amendment protects matters which constitute the editorial process from compelled discovery and, if so, the extent of that protection.

II

I agree with the Chief Judge that compelled discovery of the editorial selection process implicates the First Amendment. I arrive at this position not on First Amendment grounds generally but in light of what seems to be the Supreme Court’s evolving recognition of the special status of the press<sup>10</sup> in our governmental system and the concomitant special recognition of the Free Press clause of the First Amendment. Mr. Justice Stewart, in a seminal speech at the Yale Law School, has characterized this trend as a structural, institutional differentiation between freedom of speech and freedom of press.<sup>11</sup> The trend has found expression that is both developmental and fundamental in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). There the Court established an area of protection of the press against “intrusion into the function of editors.” *Id.* at 258. The Court held unconstitutional a Florida statute requiring newspapers to print the replies of political candidates who had been editorially attacked. Chief Justice Burger’s opinion for a unanimous Court explained that “governmental regulation” of the “crucial process” of “editorial control and judgment” can-

10 That the broadcast media are “press” is reasonably well established. *E.g., Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 496-97 (1975); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 394 (1969); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 166 (1948).

11 Stewart, “Of the Press,” 26 *Hastings L.J.* 631, 633 (1975); *see* text accompanying notes 16-17 *infra*.

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not be exercised consistently with evolving First Amendment guarantees of a free press. *Id.*<sup>12</sup> *Tornillo* expressly

12 Concurring, Mr. Justice White noted:

Regardless of how beneficent-sounding the purposes of controlling the press might be, we prefer "the power of reason as applied through public discussion" and remain intensely skeptical about those measures that would allow government to insinuate itself into the editorial rooms of this Nation's press.

*Miami Herald Publishing Co. v. Tornillo*, *supra*, 418 U.S. at 259 (White, J., concurring) (footnote omitted). But see *Red Lion Broadcasting Co. v. FCC*, *supra*, 395 U.S. at 385-86, holding that political editorializing by radio broadcasters is subject to the "fairness doctrine" under the Federal Communications Act. As to the right of access guaranteed by *Red Lion*, see F. Friendly, *The Good Guys, The Bad Guys and the First Amendment: Free Speech vs. Fairness in Broadcasting* (1976). Compare B. Schmidt, *Freedom of the Press vs. Public Access* (1976), with Abrams, *In Defense of Tornillo*, 86 Yale L.J. 361 (1976) (book review).

The *Red Lion* opinion, as well as the Act of Congress on which it is based, have been increasingly criticized for failing to consider the institutional aspects of the press. E.g., Note, *Press Protections for Broadcasters: The Radio Format Change Cases Revisited*, 52 N.Y.U.L. Rev. 324, 339 (1977) [hereinafter Note, *Press Protections*]. The criticism suggests that the opinion and Act fail to take into account the distinction between the Speech and Press clauses. As Chief Judge Bazelon has noted:

If one group has a right of access or a right to have the licensee present that group's point of view, there is no independent press; there is only a multitude of speakers. That might be permissible if the First Amendment protected only free speech. However, it also protects the press.

Bazelon, *FCC Regulation of the Telecommunications Press*, 1975 Duke L.J. 213, 235 (footnote omitted); see Note, *Press Protections*, *supra* at 339 n.102.

It has been asserted that historically there was no differentiation between Speech and Press guarantees. L. Levy, *Legacy of Suppression: Freedom of Speech and Press in Early American History* 173-74 (1960); Lange, *The Speech and Press Clauses*, 23 U.C.L.A. L. Rev. 77, 88-99 (1975); Note, *Press Protections*, *supra* at 342. But the High Court arguably has established the differentiation by now whether or not it was the "original position." Compare Stewart, *supra* note 11, at 631-37, and Nimmer, *Introduction—Is Freedom of the Press a Redundancy: What Does It Add to Freedom of Speech?*, 26 Hastings L.J. 639, 645-50 (1975), with Lange, *supra* at 77 *passim*.

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adopted some of the premises and many of the implications of *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973). *Columbia Broadcasting* had emphasized the First Amendment right of broadcasters to make independent editorial programming decisions. In holding that neither the Communications Act nor the First Amendment requires broadcasters to accept paid editorial advertisements, Chief Justice Burger stated:

For better or worse, editing is what editors are for; and editing is selection and choice of material. That editors—newspaper or broadcast—can and do abuse this power is beyond doubt, but . . . [c]alculated risks of abuse are taken in order to preserve higher values.

*Id.* at 124-25.

Governmental regulation surely includes judicial as well as legislative regulation; the First Amendment binds the courts just as it binds the other branches of government.<sup>13</sup> *Tornillo* and *Columbia Broadcasting* thus suggest and support, if they do not compel, the proposition that the First Amendment will not tolerate intrusion into the decision-making function of editors,<sup>14</sup> be it legislative or judicial action.

13 *Sullivan* itself recognizes limitations on the courts imposed by the First Amendment. So, too, does *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976) (judicially imposed gag order violates First Amendment rights of the press).

14 See *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 391 (1973). There the Court, in upholding the constitutional validity of an ordinance prohibiting sex-based help-wanted advertisements, emphasized:

[N]othing in our holding allows government at any level to forbid Pittsburgh Press to publish and distribute advertisements

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The district court declined to apply the editorial process concept simply on the basis that *Tornillo* and *Columbia Broadcasting* had “nothing to do” with the proper boundaries of discovery in a libel case. *Herbert v. Lando*, 73 F.R.D. 387, 396 (1977). While this notion may be appealing initially, the principle enunciated in these cases—that the editorial process of the *press* is entitled to special protection—has, I think, not just pertinent, but altogether controlling ramifications.<sup>15</sup> As Mr. Justice Stewart has pointed out, “the Free Press guarantee is, in essence, a *structural* provision of the Constitution.”<sup>16</sup> He continues:

Most of the other provisions in the Bill of Rights protect specific liberties or specific rights of individuals: freedom of speech, freedom of worship, the right to counsel, the privilege against compulsory self-incrimination, to name a few. In contrast, the Free Press Clause extends protection to an institution. The publishing business is, in short, the only organized private business that is given explicit constitutional protection.

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commenting on the Ordinance, the enforcement practices of the Commission, or the propriety of sex preference in employment. Nor, *a fortiori*, does our decision authorize any restriction whatever, whether of content or layout, on stories or commentary originated by Pittsburgh Press, its columnists, or its contributors. On the contrary, we reaffirm unequivocally the protection afforded to editorial judgment and to the free expression of views on these and other issues, however controversial.

<sup>15</sup> Government intrusion into editorial functions may result from compelled disclosure of editorial conclusions, opinions and intentions. To be sure, *Tornillo* and *Columbia Broadcasting* do not specifically deal with First Amendment limitations on discovery. But they give concrete form to the structural concept of press freedom in the editorial selection process which would otherwise be subjected to stress, if not internally weakened to the point of nonrepair, by the probing drill of unrestrained discovery.

<sup>16</sup> Stewart, *supra* note 11, at 633-34.

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This basic understanding is essential, I think, to avoid an elementary error of constitutional law. It is tempting to suggest that freedom of the press means only that newspaper publishers are guaranteed freedom of expression. They *are* guaranteed that freedom, to be sure, but so are we all, because of the Free Speech Clause. If the Free Press guarantee meant no more than freedom of expression, it would be a constitutional redundancy . . . .

It is also a mistake to suppose that the only purpose of the constitutional guarantee of a free press is to insure that a newspaper will serve as a neutral forum for debate, a “marketplace for ideas,” a kind of Hyde Park corner for the community. A related theory sees the press as a neutral conduit of information between the people and their elected leaders. These theories, in my view, again give insufficient weight to the institutional autonomy of the press that it was the purpose of the Constitution to guarantee . . . .

The primary purpose of the constitutional guarantee of a free press was . . . to create a fourth institution outside the Government as an additional check on the three official branches.

Stewart, “*Or of the Press*,” 26 Hastings L.J. 631, 633-34 (1975) (emphasis in original).

The structural or institutional aspect of the Free Press guarantee is not, as Justice Stewart points out, some filigree added at the final stages of design by the architects of the Constitution. Rather it is at the core of the construct, vital to the tensile integrity of our government. See *New York Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring); *United States v. National*

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*Committee for Impeachment*, 469 F.2d 1135, 1142 (2d Cir. 1972). To the extent that the independent exercise of editorial functions is threatened by governmental action, the very foundations of the architectural masterpiece that is our form of government are shaken, the supporting columns weakened.<sup>17</sup>

*Tornillo* and *Columbia Broadcasting* recognize the inviolability of the editorial function. As such they reflect a keen judicial recognition of the role of the press in American society and its need for protection, a trend that has been evidenced by practically solid judicial response in favor of protection.

The doctrine of prior restraint, prohibiting government from censoring publications in advance, is of the highest constitutional magnitude.<sup>18</sup> This presumption<sup>19</sup> against the

17 But see *Carey v. Hume*, 492 F.2d 631, 639-40 (D.C. Cir. 1974) (MacKinnon, J., concurring) (immense power of modern media requires that reporter divulge sources in civil libel suit), cert. dismissed, 417 U.S. 938 (1974). The power that Judge MacKinnon (and the advocates of the Florida access statute in *Tornillo*) fears may, however, be dealt with in other ways. The FCC has, for example, won court approval to bar newspaper ownership of broadcast/television media in a single locale in the future. See *National Citizens Comm. for Broadcasting v. FCC*, 555 F.2d 938 (D.C. Cir. 1977), cert. granted, 46 U.S.L.W. 3179-80 (U.S. Oct. 4, 1977) (Nos. 76-1471, 76-1521, 76-1595, 76-1604, 76-1624, 76-1685).

18 Prior restraints have generally been condemned as the most egregious violations of press freedom. E.g., *Nebraska Press Ass'n v. Stuart*, supra, 427 U.S. at 559 ("A prior restraint . . . has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time.") (footnote omitted); see *Times Film Corp. v. City of Chicago*, 365 U.S. 43, 53 (1961) (Warren, C.J., dissenting). The precise parameters of the prior restraint doctrine have never been delineated. *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931), expanded the classic English definition of prohibiting publication without advance approval of the government to preclude an injunction against publication of malicious and scandalous matter enforced by a

Footnote 19 appears on p. 33a

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constitutional validity of prior restraints is particularly strong when the intrusion affects the communication of news or commentary on current events. See *Nebraska*

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subsequent contempt order. The later threat of an injunction was viewed as a prior restraint; while the metaphor of "chilling effect" had not yet been devised it was already operational. The broad scope of the doctrine is apparent from the holding in *Grosjean v. American Press Co.*, 297 U.S. 233 (1936), where a tax imposed on newspapers publishing advertisements and measured by the amount of circulation was found to be an unconstitutional prior restraint because the tax lowered advertising revenues and restricted circulation. *Id.* at 244-45. Justice Sutherland explained the scope of the prior restraint doctrine as enunciated in *Near*:

The conclusion there stated is that the object of the constitutional provisions was to prevent previous restraints on publication; and the court was careful not to limit the protection of the right to any particular way of abridging it . . . .

Judge Cooley has laid down the test to be applied—"The evils to be prevented were not the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens." 2 Cooley's Constitutional Limitations, 8th ed., p. 886.

*Id.* at 249-50.

The broad discovery order in this case operates after publication to deter free editorial choice concerning subsequent publications. Because the order operates as a prior restraint, as did the tax in *Grosjean*, it should be presumed invalid. See T. Emerson, *The System of Freedom of Expression* 503-12 (1970). Furthermore, the order impinges on the most sensitive functions of the press, the motivations behind and thought processes involved in editorial decisions; thus, the presumption should be given all the more force. The prior restraint cases, as well as *Tornillo* and *Columbia Broadcasting*, appear to be directed against the danger of self-censorship by the press arising from concern with subsequent executive, legislative or judicial scrutiny. It is the protection these cases afford that truly gives rise to the concept of the press as a Fourth Estate, coequal in our democratic republic in constitutional respect, even though not incorporated formally into our governmental system as a structuralized entity.

19 *New York Times Co. v. United States*, supra, 403 U.S. at 714; *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).

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*Press Association v. Stuart*, 427 U.S. 539, 559 (1976); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 717 (1931).

Further solidifying judicial recognition of the compelling institutional need for an independent press, again in a test that has been nothing less than momentous, is the decision that notwithstanding the Sixth Amendment guarantee to a fair trial by an impartial jury, judicial restraints on the publication of information concerning criminal trials will be tolerated only when less drastic methods of avoiding the effects of pretrial publicity are useless.<sup>20</sup> *Nebraska Press Association v. Stuart*, *supra*, 427 U.S. at 562. The Freedom of Press guarantee against governmental intrusions on the editorial process is surely at least as strong when, as here, other constitutional rights are not at stake.

20 Another example of increasing judicial recognition of the fundamentality of the Press guarantee is the newly perceived status of commercial speech. See *Bates v. State Bar of Ariz.*, 45 U.S.L.W. 4895 (U.S. June 27, 1977); *Linmark Assocs., Inc. v. Township of Willingboro*, 45 U.S.L.W. 4441 (U.S. May 2, 1977); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Bigelow v. Virginia*, 421 U.S. 809 (1975). The *Sullivan* doctrine itself, subjecting the common law of libel to First Amendment limitations, while addressed to expression generally, *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964), also reflects a pervasive Supreme awareness of the arterial flow to our system of democracy given through the channels of a free press. The *Sullivan* doctrine was, after all, enunciated in a suit against a newspaper. The opinion of the Court drew extensively on the history of the discredited Alien and Sedition Acts, *id.* at 273-77, emphasizing Madison's Report to the effect that "the press has exerted a freedom in canvassing the merits and measures of public men, of every description, which has not been confined to the strict limits of the common law." *Id.* at 275 (quoting 4 Elliot's Debates on the Federal Constitution 570 (1876)). Mr. Justice Goldberg, concurring, advocated unconditional First Amendment protection to criticize official conduct. *Id.* at 298. He, too, relied heavily on the need for robust debate to ensure a stable, responsive democratic government. See *id.* at 300. See generally 1 N. Dorsen, P. Bender & B. Neuborne, *Emerson, Haber & Dorsen's Political and Civil Rights in the United States* 20-51 (4th ed. 1976) [hereinafter 1 N. Dorsen], for an historical analysis of the First Amendment.

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In short, the principles underlying the access and prior restraint cases apply in this situation even though the government is neither ordering the content of a publication nor directly restraining publication. The critical question is whether government is impermissibly impeding the editorial function of the press; the time<sup>21</sup> at which this intrusion occurs should not—it cannot—matter.<sup>22</sup> Because broad discovery orders compelling disclosure of the editorial selection process can result in a chilling of "the free interchange of ideas within the news room," *ante* at 232, the "crucial process" of "editorial control and judgment" protected by the Freedom of Press clause, *Miami Herald Publishing Co. v. Tornillo*, *supra*, 418 U.S. at 258, is in as much jeopardy as if the court had restrained publication *ab initio*. For self-censorship in the future resulting from the prior judicial order is a foreseeable, perhaps a likely, result. "The special vice of a prior restraint is that communication will be suppressed, either directly or by inducing excessive caution in the speaker, before an adequate

21 The phrase "prior restraint" obviously no longer connotes a strict temporal meaning. Supreme Court cases indicate, see note 18 *supra*, that meddling with press freedoms after the printing or programming has occurred operates as a "prior restraint" on future editorial decisions by virtue of the chilling effect created by that interference. See *T. Emerson*, *supra* note 18, at 511.

22 It has often been acknowledged that trivial distinctions between types of governmental intrusion will not be relied upon when the effects impinge the Free Press guarantee.

In rejecting the argument that there is a meaningful difference between government restricting the content of press communications and compelling the press to publish what "reason tells them should not be published," the Court in *Tornillo* noted that "[g]overnmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers." 418 U.S. at 256. See *Baker v. F & F Investment*, 470 F.2d 778, 785 (2d Cir. 1972) (Kaufman J.), *cert. denied*, 411 U.S. 966 (1973).

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determination that it is unprotected by the First Amendment." *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376, 390 (1973). This is a concern directed at the "institutional viability" of the press. *Id.* at 382. Uninhibited discovery into the motivations of the editor in a libel action poses precisely the danger sought to be avoided by the landmark cases which have established the prior restraint doctrine as hornbook constitutional law. Accordingly, the principles underlying the doctrine necessitate the application of the Free Press guarantee to protect the independence of the press against such discovery.

This is by no means the first instance in which First Amendment considerations have dictated special procedural rules.<sup>23</sup> It is not even the first situation in which a court has held that the First Amendment extends protection in a libel case beyond the standards for liability established in *Sullivan* in order to prevent undue chilling from the litigation process itself.<sup>24</sup>

23 See, e.g., *Broadrick v. Oklahoma*, 413 U.S. 601, 611-14 (1973) (relaxed standing rules to challenge statutes allegedly violative of the First Amendment); *Baker v. F & F Investment*, *supra*, 470 F.2d at 783 (rejecting disclosure of journalists' sources in civil rights case except under limited circumstances).

24 Indeed, in *Sullivan* the Court qualified those standards by the self-imposed procedural limitation that it would make an independent examination of the entire record. *New York Times Co. v. Sullivan*, *supra*, 376 U.S. at 285 & n.26; see *Time, Inc. v. Pape*, 401 U.S. 279, 284 (1971); *Buckley v. Littell*, *supra*, 539 F.2d at 888. A number of courts taking a normally cautious attitude toward summary judgment have been somewhat more relaxed in constitutional libel cases. *Washington Post Co. v. Keogh*, 365 F.2d 965, 967-68 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1011 (1967); see 1 N. Dorsen, *supra* note 21, at 693-95. To prevail, moreover, again as established by *Sullivan* itself, a plaintiff's evidence must be of "convincing clarity," rather than a mere preponderance. *New York Times Co. v. Sullivan*, *supra*, 376 U.S. at 285-86; see *Wasserman v. Time, Inc.*, 424 F.2d 920, 922 (D.C. Cir.) (Wright, J., concurring), *cert. denied*, 398 U.S. 940 (1970); Freund,

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By recognizing that *Tornillo* and *Columbia Broadcasting* require a constriction of the normal discovery rules to protect the editorial selection process of the press from compelled scrutiny, we simply add an additional procedural rule in the interest of ensuring an independent, institutional freedom of the press.<sup>25</sup> Only the level of protection remains to be determined.<sup>26</sup>

### III

In selecting the appropriate level of protection for the editorial process, we are faced with three theoretical pos-

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*William J. Brennan, Jr.*, 86 Yale L.J. 1015, 1016 (1977). First Amendment considerations have been held to lead more readily to a finding of *forum non conveniens*, *Buckley v. New York Post Corp.*, 373 F.2d 175, 183-84 (2d Cir. 1967), and lack of jurisdiction, *New York Times Co. v. Connor*, 365 F.2d 567, 570-73 (5th Cir. 1966).

25 To the extent that this conclusion creates an inconsistency between judicial treatment of the press on the one hand and non-press defendants on the other, the inconsistency may be said to rest upon the non-redundant nature of the Freedom of Press guarantee. See note 12 *supra*. But see *Restatement (Second) of Torts* § 580B, Comment d at 29-30 (Tent. Draft No. 21, 1975), discussing the scope of *Gertz v. Robert Welch, Inc.*, *supra*:

The defendant in the *Gertz* case was the publisher of a magazine. The Court speaks frequently of "news media" and "communications media" and states the rule in terms of a "publisher or broadcaster." The precise holding of the case therefore, [sic] does not extend beyond a statement published by a member of the communications media; and the constitutional requirement of fault on the part of the defendant may turn out to be limited to this holding, though this seems unlikely.

Of course, there would be no inconsistency if the *Sullivan* rule were abandoned in favor of non-liability to public figure plaintiffs.

26 From its inception the *Sullivan* rule, as a matter of substantive law, has not been spared of criticism. Justices Black, Douglas and Goldberg thought the actual malice test constitutionally deficient for inquiring in the first place into the editor's state of mind. As Mr. Justice Black explained:

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sibilities. First, we might conclude as did the lower court that *Sullivan* has struck the ultimate appropriate balance so that the libel plaintiff must be permitted a level of discovery coterminous with the substantive law of constitutional libel. If so, then the plaintiff would be permitted to inquire into every aspect of the defendant's state of mind at the discovery stage with little or no inhibition.

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"Malice," even as defined by the Court, is an elusive, abstract concept, hard to prove and hard to disprove. The requirement that malice be proved provides at best an evanescent protection for the right critically to discuss public affairs . . . .

376 U.S. at 293 (Black, J., concurring). Mr. Justice Goldberg elaborated further by noting that the right to criticize official misconduct, "to speak one's mind" . . . about public officials and affairs . . . should not depend upon a probing by the jury of the motivation of the citizen or press." *Id.* at 298 (Goldberg, J., concurring) citations and footnote omitted). And in his footnote two, Mr. Justice Goldberg quoted from Mr. Justice Jackson's dissent in *United States v. Ballard*, 322 U.S. 78, 92-93 (1944), that it is difficult to separate, practically or philosophically, "what is believed" from "what is believable." 376 U.S. at 298-99 n.2 (Goldberg, J., concurring). Professor Emerson has written that the actual malice rule is

subject to the very same defects that led the majority of the [*Sullivan*] Court to reject broader tests of liability[,] . . . leaves the speaker with roughly the same degree of risk as the earlier rules of negligence and engenders approximately the same amount of self-censorship . . . [and] imposes . . . an impossible problem of judicial administration.

T. Emerson, *supra* note 18, at 535-36.

Professor Emerson also attacks the *Sullivan* majority's rationale, set forth in *Garrison v. Louisiana*, 379 U.S. 64 (1964), that calculated falsehood is no essential part of any exposition of ideas as inconsistent with the concept of *Sullivan* itself. See T. Emerson, *supra*, at 536. But even inferior federal courts know that upon occasion judicial opinions may involve compromises in expression to reach a result in fact; here there was at least a procedural accommodation, note 24 *supra*.

However persuasive these arguments might be if we were writing on a clean slate, as an inferior court we are of course bound to follow the rule of *Sullivan*. Thus the editor's state of mind, not vis-à-vis the plaintiff, but vis-à-vis the truth or falsity of what is being published about the plaintiff, is a proper focus of inquiry.

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Second, we might decide that while *Sullivan* has generally struck the substantive balance, it does not preclude restraint on compelled discovery, specifically where First Amendment values are unnecessarily threatened by the nonconstitutional interest in liberal discovery. We could adapt the test developed in the disclosure of confidential source cases: evidence of the editorial process is discoverable only when it is *direct* evidence of a *highly* relevant matter which cannot otherwise be obtained.<sup>27</sup> And finally, we might opt for the conclusion that the editorial process is subject to constitutional privilege and that actual malice must be proved by evidence other than that obtained through compelled disclosure of matters at the heart of the editorial process.

The answer is not free of doubt. Strict logic leading to the selection of option one has surface appeal. Approach number two seems like a reasonable compromise at first blush. But in the delicate area of precious First Amendment liberty, see *Baker v. F & F Investment, supra*, 470 F.2d at 785, a subtly discerning eye is necessary. Hard cases make for hard choices; vision must not only be acute, it must also be peripheral.

The argument of strict logic—that the *Sullivan* test of knowing-or-reckless-falsity assumes open-ended discovery for the purpose of proving actual malice—is deficient in several respects. First, the *Sullivan* Court in no way indicates that it is doing anything more than setting forth substantive rules. It does not deal with the method of proving actual malice.<sup>28</sup> Actual malice can be proved in

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27 See note 36 & accompanying text *infra*.

28 Appellee argues that *Tornillo* and *Columbia Broadcasting* have not affected media liability under *Sullivan* and its progeny, relying on the Court's reaffirmation of the *Sullivan* liability standard in *Gertz v.*

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a number of ways. Logical inferences from the inconsistency, say, between a television program's content and contrary facts which a plaintiff might independently establish would provide an obvious starting point for such proof.<sup>29</sup> Moreover, a plaintiff might adduce circumstantial evidence from participants or interviewees on the television program. In this case, for example, documents furnished under the Freedom of Information Act indicate that Lando's state of mind may be provable without directly impinging on the editorial process.<sup>30</sup> While I offer

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*Robert Welch, Inc.*, *supra*, 418 U.S. at 342, decided on the same day as *Tornillo*. Brief for Appellee at 29 & n.\*. This argument, however, overlooks the distinction between standards of liability and the means of proving liability under the appropriate standard. *Tornillo* and *Columbia Broadcasting* have not altered the substantive law of libel established in *Sullivan*. They articulate broad First Amendment protection of editorial process decisions. The issue, then, is simply whether and to what extent this protection encompasses compulsory disclosure of the mental processes of editors. The free press principles of these cases are being applied to limit a procedural rule, not to alter the substantive law of libel.

29 A case in our court goes further perhaps than any other in permitting proof of bad motive directed toward the plaintiff to show the reckless disregard of truth that the actual malice test of *Sullivan* requires. See *Goldwater v. Ginzburg*, 414 F.2d 324, 342 (2d Cir. 1969), *cert. denied*, 396 U.S. 1049 (1970) ("evidence of negligence, of motive and of intent may be adduced for the purpose of establishing, by cumulation and by appropriate inferences, the fact of a defendant's recklessness or of his knowledge of falsity"). *Goldwater*, however, was not concerned with the boundaries of plaintiff's discovery into the editorial process but rather dealt principally with the sufficiency of the evidence adduced and the correctness of the judges charge to the jury on the appropriate standard of substantive law.

30 The documents, prepared by Lieutenant Colonel F. B. Reed, Jr., indicate that in anticipation of the broadcast Lando told Colonel Reed that "Lando's stated premise is that Herbert is a liar and he has stated that if he can't develop a sufficient number of incidents in which Herbert's account can not [sic] be debunked, then there will be no story." Brief for Appellee at 56 (Exhibit I). On December 4, 1972, Lando interviewed Colonel J. Ross Franklin. During the interview, at

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no opinion on the admissibility or adequacy of this evidence to prove actual malice, it is clear that an editor's state of mind can be examined without discovering facts at the heart of the editorial process. Limiting discovery to those matters and persons not at the heart of the editorial process does not transform the *Sullivan* rule into a nullity for putatively libeled public figures. They can prove actual malice without endangering the editorial process which *Tornillo* held to be protected by the First Amendment.<sup>31</sup>

Second, the *Sullivan* balance, by permitting plaintiffs the opportunity to prove actual malice, deems a certain level of chilling-effect fallout to be consistent with the First Amendment.<sup>32</sup> However, permitting compelled discovery

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which Reed was present, Lando "persist[ed] in [his] contention that he is interested in debunking Herbert. . . . After the interview he informed me that Mike Wallace has agreed to do the narration and is equally convinced that the story is in debunking Herbert. Lando asserts that he has [the] final decision on the segment and it will not go unless he can convincingly portray Herbert as the bad guy." *Id.* at 57 (Exhibit II). The third document reveals that on December 20, 1972, Lando in a meeting with Major General Sidle "indicated that his peice [sic] is aimed at debunking Herbert in his long fight against the the Army. Further Lando indicated that he would focus some attention on the failure of the media to check out Herbert's story prior to 'puffing him up'. [Sic.] He plans to focus on four or five events whcih [sic] are contained in Herberts [sic] book and factually destroy Herbert's credibility." *Id.* at 58 (Exhibit III).

31 Limiting plaintiff's discovery concededly may deprive him of ad-ducing the best proof of malice in the common law sense of ill will toward the plaintiff. But *Sullivan* itself distinguishes common law malice from actual malice. Limiting proof of actual malice as defined in *Sullivan* resembles other rules of evidence which limit the "search for truth" in the interests of a higher social policy. See, e.g., Fed. R. Evid. 407, precluding introduction of subsequent remedial measures to prove negligence in order to encourage the promotion of safety.

32 *Hotchner v. Castillo-Puche*, 551 F.2d 910 (2d Cir. 1977), *cert. denied*, 46 U.S.L.W. 3202 (U.S. Oct. 4, 1977), provides an excellent example

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of the editorial process would indubitably increase the level of chilling effect in a way ostensibly not contemplated by *Sullivan*. Thus, it is one thing to tell the press that its end product is subject to the actual malice standard and that a plaintiff is entitled to prove actual malice; it is quite another to say that the editorial process which produced the end product in question is itself discoverable. Such an inquiry chills not simply the material published but the relationship among editors. Ideas expressed in conversations, memoranda, handwritten notes and the like, if discoverable, would in the future "likely"<sup>33</sup> lead to a more muted, less vigorous and creative give-and-take in the editorial room. This incremental chilling effect exceeds the level of chilling effect contemplated by the *Sullivan* balance.

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of the inhibiting effect that *Sullivan* may exercise on First Amendment freedoms. In *Hotchner*, the defendant had written a biography of Ernest Hemingway with uncomplimentary references to the plaintiff, a public figure. Prior to publication the editor, pursuant to recommendations of the legal department of Doubleday & Co., Inc., suggested that a number of passages "be eliminated or toned down." *Id.* at 912. Even though the author "vouched for the statements" in his manuscript, he "accepted the suggested modification." *Id.* The self-censorship was nonetheless imposed despite the fact that it may have been unnecessary in view of the court's subsequent conclusion that "[w]here a passage is incapable of independent verification, and where there are no convincing indicia of unreliability, publication of the passage cannot constitute reckless disregard for truth." *Id.* at 914.

33 See *Lamont v. Postmaster General*, 381 U.S. 301, 307 (1965) (postal regulation that those wishing to receive "communist political propaganda" had to request it of the Post Office held unconstitutional because "any addressee is likely to feel some inhibition" at doing so (emphasis added)); *Talley v. California*, 362 U.S. 60, 64 (1960) (requirement that the names and addresses of those who wrote and/or sponsored the distribution of handbills held unconstitutional because it "would tend to restrict freedom to distribute information and thereby freedom of expression" (emphasis added)).

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Finally, the fatal flaw of the strict logic position is its failure even to consider *Tornillo's* and *Columbia Broadcasting's* ramifications. It ignores the special status which the Free Press guarantee accords to the editorial process.<sup>34</sup>

The compromise position is similarly defective. While taking account of *Tornillo's* mandates, it falls short of the protection required by *Sullivan* and *Tornillo*. Admittedly, the compromise test accounts for the argument advanced above that evidence of actual malice is obtainable from sources other than compelled discovery of editors' state of mind because the compromise test itself requires that the evidence be not otherwise obtainable.<sup>35</sup> However, the incremental chilling effect engendered by this test, while not as great as in the case of uninhibited discovery, is still significant. First, the editorial relationship may be chilled if its dynamics are subject to forced scrutiny. The knowledge that in a certain number of cases the editorial process will be discoverable is itself likely to chill that process, because no editor can visualize when a court will consider relevancy to be "high" or evidence to be "direct" or "otherwise unobtainable." Beyond this, the compromise test is vague, difficult of application, and hence likely to be the subject of constant litigation.<sup>36</sup> In effect, the discovery process itself, and the resulting litigation over the "directly-related," "highly-relevant" and "otherwise-unobtainable" standards,

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34 I do not make the distinction between the institutional press and the individual pamphleteer which Judge Meskill suggests in dissent, *post* at 267. Rather, the distinction I draw is between communicative functions properly protected under the Free Press clause and expression protected by the Free Speech guarantee.

35 Of course, the number of instances that the evidence is in fact not otherwise obtainable in some form should be few. This does not mean that the chilling effect in the editorial room would be concomitantly reduced. The fear of such discovery and of the full scale utilization of the litigation process as permitted by the compromise test are likely to stifle the flow of ideas in the editorial room.

36 See *New York Times Co. v. Sullivan*, *supra*, 376 U.S. at 277-78.

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are not merely likely to make editors more cautious, but inevitably will require them to be. The chilling effect of the compromise test is, therefore, of a greater degree than that tolerated by *Sullivan* with the gloss of *Tornillo* and *Columbia Broadcasting*.

There is an additional reason for rejecting the compromise position: it developed in a very different context from that at issue here. *Baker v. F & F Investment, supra*, 470 F.2d at 783-84, in its discussion of *Garland v. Torre*, 259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958), indicates that the appropriate standard for compelled disclosure of journalists' sources in civil litigation is that the evidence is closely related to the very essence of the plaintiff's case and that the information is not obtainable from other sources.<sup>37</sup> However, in *Baker* and *Garland* very different First Amendment interests were at stake from those at issue here. In those cases, the information sought to be disclosed, whether or not vital to the plaintiff's case, was far removed from the editorial process. In this case, the plaintiffs do not seek discovery on the periphery of the editorial process. That they have already done, as Chief Judge Kaufman notes, to the tune of 2,903 pages in deposition testimony and of 240 exhibits. Rather, plaintiffs now seek to discover the very heart of the editorial process. This they may not do consistently with *Tornillo*'s and *Columbia Broadcasting*'s solicitude for the editorial process. I, therefore, would conclude that *Tornillo*, *Columbia Broadcasting* and *Sullivan* mandate full protection of the editorial process from compelled disclosure. This is true

<sup>37</sup> Cf. *Branzburg v. Hayes, supra* (rejecting argument of journalists who had witnessed crimes that they were not obliged to testify before grand juries with respect thereto). In *Baker v. F & F Investment, supra*, 470 F.2d at 783, the Second Circuit distinguished *Branzburg* and thereby protected journalists from compelled disclosure of sources in civil litigation.

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because as soon as facts are set in their context there is editorial selection; as soon as that process is subject to scrutiny, there is a suppression effect; and as soon as there is such an effect, the freedom of the press has evaporated.

IV

I pass then to when editorial process immunity from compelled disclosure is properly invoked. The parameters of the editorial process concept will become more definite in the context of future cases. The obvious starting point, however, is the Chief Justice's delineation in *Tornillo*: "[t]he choice of material" to go into the broadcast, "the decisions made" on the duration and "content" of the broadcast, and "treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment." 418 U.S. at 258. Thus, *Tornillo* mandates that the mental processes of the press regarding "choice of material," duration, and "content" of the broadcast are to be protected from scrutiny.<sup>38</sup>

At this stage of the proceedings we are not capable of determining which discovery demands fall within the editorial process privilege. I agree with the Chief Judge that at least five of the broad categories into which the district court grouped plaintiff's questions seemingly fall within the privilege. Each area of dispute relates to Lando's conclusions, opinions, intentions, or conversations concerning

<sup>38</sup> To the extent that *Buckley v. Vidal*, 50 F.R.D. 271 (S.D.N.Y. 1970), is inconsistent with this opinion, this court obviously now declines to follow it.

While the question need not be answered here, I would assume that the very same protection would be afforded the press in a trial on the merits. Compelled testimony at trial on matters privileged from compelled pretrial discovery should similarly be privileged, because this case concerns privilege, not undue oppression. See text accompanying notes 7-9 *supra*.

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people or leads to be pursued, the veracity of persons interviewed, and Lando's reasons for the inclusion or exclusion of certain material. By permitting interrogation into these areas of editorial selection, the judiciary improperly intrudes upon freedom of the press just as the Florida legislature did in *Tornillo*. Whether the intrusion is judicial or legislative, the result is an unconstitutional suppression effect. There may, however, be individual questions inappropriately grouped within the protected categories. I think it is open to the district judge to determine in specific instances that Lando was not engaged in the process of editorial selection. With these caveats I concur in the general answer to the certified question and in the remand to the district court for a determination of the nature of each question in dispute.

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MESKILL, *Circuit Judge* (dissenting):

I respectfully dissent. In this action, Anthony Herbert alleges that he has been libeled by Barry Lando, Mike Wallace, C.B.S. and Atlantic Monthly. Under *New York Times v. Sullivan*, 376 U.S. 254 (1964), he may prevail if he proves that the defendants acted with "actual malice," that is, knowing or reckless disregard of the truth. The major purpose of this lawsuit, therefore, is to expose the defendants' subjective state of mind—their thoughts, beliefs, opinions, intentions, motives and conclusions—to the light of judicial review. Obviously, such a review has a "chilling" or deterrent effect. It is supposed to. The publication of lies should be discouraged. The discovery by a libel plaintiff of an editor's state of mind will not chill First Amendment activity to any greater extent than it

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is already being chilled as a result of the very review permitted by *New York Times v. Sullivan*. The majority's attempt to eliminate or reduce that chill is supportable in neither precedent nor logic.

The plaintiff in a libel action bears the heavy burden of proving actual malice by clear and convincing proof. The notion that a plaintiff carrying such a burden should be denied the right to ask what the defendant's mental state was is remarkable on its face. In my view Judge Haight was quite right to apply the normal rules of discovery and to permit inquiry into the defendants' mental state.

Chief Judge Kaufman finds a basis for creating a new editorial privilege in "the privilege established by *Branzburg* [v. *Hayes*, 408 U.S. 665 (1972)]," *ante* at 227, and in the Supreme Court's decisions in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (right of reply statute), and *C.B.S., Inc. v. Democratic National Committee*, 412 U.S. 94 (1973) (editorial advertising), which deal generally with the protections afforded to "the exercise of editorial control and judgment." 418 U.S. at 258. By combining the *Branzburg* privilege with the *Tornillo* and *C.B.S.* protections for editing, the Chief Judge creates an editorial privilege. Judge Oakes adopts a somewhat different approach. He too relies on *Branzburg*, *Tornillo* and *C.B.S.*, but he goes further and, relying primarily on a speech given by Mr. Justice Stewart at the Yale Law School, extracts from the free press clause a doctrine which appears to convert the fourth estate into an institution not unlike an unofficial fourth branch of government. This fourth branch is given a special privilege presumably for the same reasons that the three official branches are given executive, congressional and judicial privileges.

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I find neither approach persuasive. Contrary to the suggestions of my colleagues, there is presently no constitutional privilege against disclosure of a journalist's confidential sources, either in the criminal context, *Branzburg v. Hayes*, *supra*, or in the civil context, *Garland v. Torre*, 259 F.2d 545 (2d Cir.) (Stewart, J.) (libel action), *cert. denied*, 358 U.S. 910 (1958). *Baker v. F & F Investment*, 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973), which is cited by the majority as supporting such a privilege, merely held that a district judge in a civil case did not abuse his discretion in denying a motion to compel a non-party journalist to disclose the identity of a confidential news source where the identity of the source was of questionable materiality to the plaintiff's cause of action and could be obtained by other means. The Court explained:

Although it is safe to conclude, particularly after the Supreme Court's decision in *Branzburg* . . . that federal law does not recognize an absolute or conditional journalist's testimonial "privilege", neither does federal law require disclosure of confidential sources in each and every case, both civil and criminal, in which the issue is raised.

470 F.2d at 781. The decision stands for the proposition, with which I wholeheartedly agree, that the public interest reflected in the First Amendment and in State "newsman's privilege" statutes is entitled to be considered when a district judge exercises discretion with regard to discovery matters. The decision recognized no privilege. In view of *Branzburg* and *Garland* it could not have. *See also Caldero v. Tribune Publishing Co.*, 98 Idaho 288, 562 P.2d

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791, *cert. denied*, 46 U.S.L.W. 3288 (U.S. Oct. 31, 1977); *Carey v. Hume*, 492 F.2d 631 (D.C. Cir.), *cert. dismissed*, 417 U.S. 938 (1974). Thus, to the extent that the majority relies on "the privilege established by *Branzburg*" and its elaboration in *Baker*, today's decision is without precedential foundation.

The *Tornillo* and *C.B.S.* decisions also provide little support for the privilege created by the majority. Those cases establish that when the government tries to control what is published or broadcast the courts may find an unconstitutional "intrusion into the function of editors." 418 U.S. at 258. Neither decision supports the unqualified "proposition that the First Amendment will not tolerate intrusion into the decisionmaking function of editors." *Ante* at 248 (Oakes, J., concurring). Some intrusions, such as those which occur when the press is required to publish or broadcast views with which it disagrees, are prohibited. Other intrusions, such as the intrusion inherent in all libel actions, are permitted. *See generally Branzburg v. Hayes, supra*, 408 U.S. at 681-85. The intrusion against which the majority seeks to protect editors is the chilling effect that "judicial review of the editor's thought processes," *ante* at 232, will have on the "exercise of editorial judgment." *Id.* at 232; 253-254 (Oakes, J., concurring). After *New York Times v. Sullivan*, however, judicial review of the editor's thought process is what a libel action is all about. The mere existence of a libel cause of action chills the exercise of editorial judgment. That is the whole idea. It is exactly this kind of chill that *New York Times v. Sullivan* condones.

Judge Oakes' argument based on the "structural or institutional aspect of the Free Press guarantee," *ante* at 250, is troubling for two reasons. First, I doubt whether

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it can be considered to add anything to the Chief Judge's arguments based on *Branzburg*, *Tornillo* and *C.B.S.* Second, before the Court can recognize any special, preferred position for the press as an institution, it must necessarily recognize a distinction between personal rights on the one hand and institutional rights on the other. "Freedom of the press is a 'fundamental personal right' " which encompasses "the right of the lonely pamphleteer who uses carbon paper or a mimeograph" as well as that of "the large metropolitan publisher who utilizes the latest photo-composition methods." *Branzburg v. Hayes*, *supra*, 408 U.S. at 704, quoting, *Lovell v. Griffin*, 303 U.S. 444, 450 (1938). If we distinguish between institutional and personal rights to liberty of the press and place the former in a preferred position, then we necessarily place the latter in a subordinate position. The First Amendment interest of the public in having access to the truth is not necessarily better served by an institution than an individual. I would recognize such a distinction only with the greatest reluctance, and I would certainly not do so on the basis of a single speech, even one given by Mr. Justice Stewart. Compare *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974), in which the Supreme Court, per Mr. Justice Stewart, held that journalists have no special access to information not available to the public generally.

It makes no sense at all for us to construct a privilege designed to eliminate or reduce a chill on expressive activity which is already generated by the libel action itself. I do recognize, however, that some of the discovery sought by Herbert, particularly the conversations sought in the fourth of the five categories of assertedly objectionable inquiries, *ante* at 239, has a potential for what Judge Oakes

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refers to as an "incremental" chilling effect, *ante* at 260-261, over and above that contemplated by *New York Times v. Sullivan*. The discovery of communications between editors and journalists, as distinguished from subjective mental states, may well have the effect of inhibiting "the free interchange of ideas within the news room." *Ante* at 232, 253 (Oakes, J., concurring). If the press were forced to disclose all of the ideas and theories that are explored during the editorial process, then intellectual exploration itself would be discouraged—without necessarily, or even probably, deterring irresponsible journalism. By thus discouraging "the creative verbal testing, probing, and discussion of hypotheses and alternatives which are the *sine qua non* of responsible journalism," *ante* at 232; *see* 259-60 (Oakes, J., concurring), discovery of the communications sought under category four could have an incremental chilling effect not built into the *New York Times v. Sullivan* libel action. The operation of this incremental chill is actually rather conventional in nature. It is the same sort of chill that forms the basis for most privileges: a chill on the expression of ideas or the communication of information in the context of certain special, lawful, confidential relationships. However, a moment's reflection will reveal that a privilege sufficient to eliminate this incremental chill would have to be exceedingly broad. All confidential communications, whether oral or written and whether made in the newsroom or elsewhere, would have to be covered. It seems to me that if such a privilege were really necessary to protect the editorial function, we would have heard about it long before now. Like the Supreme Court in *Branzburg*, I would be "unwilling to embark the judiciary on a long and difficult journey to such an uncertain destination." 408 U.S. at 703.

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The Supreme Court has shown no enthusiasm for the creation of new constitutional privileges, particularly where, as here, they are based on claims of chilling effect that depend on the imaginations of judges rather than proof supplied by the parties. *Compare Branzburg v. Hayes, supra*, 408 U.S. at 693-95, *with N.A.A.C.P. v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958) (in support of its claim of a privilege against disclosure of the identity of its rank-and-file membership, the NAACP made an "uncontroverted showing" that exposure had in the past led to harassment of its membership).

I would affirm Judge Haight's order compelling discovery.

**APPENDIX B**

**Memorandum and Order**

**UNITED STATES DISTRICT COURT**

**SOUTHERN DISTRICT OF NEW YORK**

**74 Civ. 434-CSH**

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ANTHONY HERBERT,

*Plaintiff,*

—against—

BARRY LANDO, MIKE WALLACE, COLUMBIA BROADCASTING  
SYSTEM, INC., ATLANTIC MONTHLY COMPANY,

*Defendants.*

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HAIGHT, *District Judge*:

Plaintiff in this defamation action seeks an order compelling discovery pursuant to Rule 37(a)(2), F.R.C.P. Defendants vigorously resist the motion. The case presents interesting questions, one of which, insofar as the excellent briefs of counsel and the Court's own research indicate, is one of first impression. That question is:

Within the context of *New York Times v. Sullivan*, 376 U.S. 254 (1964) and its progeny, and the heavy burdens of proof they place upon "public figure" plaintiffs in defamation actions, what are the proper boundaries of pre-trial discovery?

I.

The plaintiff is Lieutenant Colonel Anthony B. Herbert (U.S. Army, Ret.) ("Herbert"). He has brought an action for defamation against defendants Columbia Broadcasting System, Inc. ("CBS"), Mike Wallace ("Wallace"). Barry Lando ("Lando") and Atlantic Monthly Company ("Atlantic"). The subjects of the action are a broadcast presented by CBS on its 60 MINUTES Program, produced by Wallace and Lando, and an article subsequently published by Atlantic and written by Lando.

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Herbert alleges that both the program and the article maliciously portrayed him as a liar, one who had committed acts of brutality and atrocities in Viet Nam and an opportunist seeking to use the war crimes issue to cover his own alleged failures in the Army.

Col. Herbert, a much-decorated Army officer, was stationed in Viet Nam from September, 1968 until early April, 1969, first as Acting Inspector General for the 173rd Airborne Brigade and thereafter as Commanding Officer of the 2nd Battalion of the Brigade until he was relieved of his command on April 4, 1969. Herbert has consistently contended that, while in Viet Nam with the 173rd Brigade, he observed and was distressed by many war crimes and atrocities, committed by American troops. According to Herbert's account, he reported these events to his superior officers, a Col. Franklin and a General Barnes; and, when these officers took no action in respect of Herbert's reports, Herbert brought formal charges against Franklin and Barnes. These charges resulted in an investigation by the Army, the results of which are not material to this motion.

During the course of these activities, Col. Herbert received considerable publicity. It is conceded that, in consequence, Herbert is a "public figure" as defined by the United States Supreme Court in *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), and more recently in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 345 (1974):

"Those who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention, are properly classed as public figures . . .

"For the most part, those who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public fig-

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ures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment."

On February 4, 1973 CBS broadcast a program in its television series 60 MINUTES. A major segment of that telecast concerned Col. Herbert. Herbert alleges in this suit that the program falsely and maliciously portrayed him as a liar in his assertions that he had reported atrocities to Col. Franklin or General Barnes; as a man capable of brutality to Vietnamese prisoners; and as a person who had used the war crimes charges against his superior officers as an excuse for his own relief from command.

Defendant Lando was the producer of the telecast in question; defendant Wallace was the narrator and one of the interviewers. In its May, 1973 issue, defendant Atlantic published an article by Lando about Herbert, which discusses the 60 MINUTES Program, Lando's activities in producing the program, and a book which Herbert had written entitled "Soldier". Herbert puts forward comparable allegations of defamation in respect of the Atlantic article.

The defendants deny that the statements concerning Herbert appearing in the telecast or the article are false. In addition, defendants deny knowledge of any falsity that may be present, or that they proceeded with reckless disregard of truth or falsity. Thus defendants, as they are of course entitled to do, cast upon Herbert the onerous burden of proof that applies in cases of this nature, as summarized recently by the Second Circuit in *Buckley v. Littell*, 539 F.2d 882, 889-890 (2d Cir. 1976):

"The appellee, a public figure, must rather have demonstrated with convincing clarity not only that the appellant's statements were false, but that appellant knew

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they were false or made them with reckless disregard of their truth or falsity."

II.

Herbert has launched extensive pre-trial discovery, including the taking of depositions of the defendants and notices to produce documents pursuant to Rule 34. Numerous disputes arose, both in respect of answering questions on depositions and producing documents. Counsel for the parties worked effectively and in a good spirit of cooperation to narrow the areas of dispute. Additional issues were resolved by the Court following a hearing. At that hearing, the remaining areas of dispute were reserved for decision, following the submission by counsel of further memoranda. Those remaining disputes will be considered in this opinion.

III.

Many of the issues arise out of the deposition of defendant Lando, the producer of the 60 MINUTES telecast and the author of the Atlantic article. Upon a number of occasions, counsel for Lando instructed him not to answer questions posed by counsel for Herbert. Herbert now seeks an order compelling answers to those questions.

The questions involved are numerous, and will not be set forth here. They may for convenience be separated into areas of inquiry, which the main brief for defendants CBS, Wallace and Lando (pp. 2-3) accurately summarizes as follows:

- "1. Lando's conclusions during his research and investigation regarding people or leads to be pursued, or not to be pursued, in connection with the '60 Minutes' segment and the *Atlantic Monthly* article;
- "2. Lando's conclusions about facts imparted by interviewees and his state of mind with respect to veracity of persons interviewed;

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- "3. The basis for conclusions where Lando testified that he did reach a conclusion with respect to persons, information or events;
- "4. Conversations between Lando and Wallace about matter to be included or excluded from the broadcast publication;
- "5. Lando's intentions as manifested by the decision to include or exclude material;
- "6. Conversations between Lando and source persons subsequent to the inception of this action;
- "7. Lando's activities as well as conversations between Lando, Wallace and/or other CBS employees concerning Herbert or the '60 Minutes' segment between broadcast and publication of the Atlantic Monthly article."

In addition, disputes exist with respect to Herbert's following discovery demands:

1. Production of a CBS memorandum prepared by a CBS "house" attorney in response to an inquiry made by Lando, under circumstances to be discussed below.
2. Questions and demands concerning communications between Atlantic and its counsel involving Lando's manuscript and the article which ultimately appeared in Atlantic.
3. Herbert also demands production of documents in the possession of CBS, Wallace or Lando during stated periods of time, regarding Herbert, the 173rd Airborne Brigade while in Viet Nam, individuals appearing or referred to on the 60 MINUTES segment, and the events described in Herbert's book "Soldier", and documents relating to communications or correspondence with Herbert's literary agent, the publishers of his book, and employees

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of Atlantic concerning Herbert, his charges, the truth and accuracy of the 60 MINUTES segment, or any individual appearing or quoted thereon. The particular area of dispute in respect of this documentation concerns production of such documents that were in the possession of the parties indicated at the stated times, but which were not specifically known to Wallace or Lando at the time the telecast was being produced.

These areas of dispute will be considered in order. Preliminarily, however, it is necessary to consider in greater detail what plaintiff must prove in order to recover. That question is inextricably interwoven with the proper boundaries of pre-trial discovery.

IV.

Defendants rely upon their First Amendment guarantee of the freedom of speech, with particular reference to "public figures". In *Goldwater v. Ginzburg*, 414 F.2d 324, 335 (2d Cir. 1969), the Second Circuit stated succinctly:

"False statements are protected only if they are honestly made."

That is a distillation of the Supreme Court's holding in *Garrison v. Louisiana*, 379 U.S. 64-75-6 (1964):

"Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection."

Thus there are two kinds of statements that are not protected:

- (1) the *knowingly false* statement; and
- (2) the false statement *made with reckless disregard of the truth*.

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These constitutionally unprotected creatures are obviously of different species. *Knowledge* of falsity is a necessary element of the first; that is not so in respect of the second. Identification of the first species turns upon an objective question of fact: did the defendant know the statement was false? Either he did or did not; if he did he is cast in damages; if he did not he is exonerated.

The second species of unprotected false statement is at once more subtle, complex and subjective. The concept of "reckless disregard for truth" inevitably carries the trier of the facts into the thought processes of the defendant: the evaluation and balancing he made of conflicting information available to him; the misgivings he may have suppressed when deciding to publish.

Thus the Supreme Court has defined false statements made in "reckless disregard for truth" as those made with "a high degree of awareness of their probable falsity", *Garrison v. Louisiana, supra*, at 74. Mr. Justice Harlan's opinion in *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 153 (1967) speaks of publication "despite the publisher's awareness of probable falsity." In *St. Amant v. Thompson*, 390 U.S. 727, 731, 732 (1968), Mr. Justice White said that reckless disregard is present if the publisher "in fact entertained serious doubts as to the truth of his publication", or where "there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports". In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 334 n. 6 (1974), the Court noted that the *St. Amant* test "equated reckless disregard of the truth with subjective awareness of probable falsity . . ."

Whether or not the present defendants "entertained serious doubts" as to the truth of the statements about Herbert, or had a "subjective awareness of probable falsity", are questions of crucial relevance. No one disputes that. The question is how a plaintiff in Herbert's position

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proves such elements as doubt or awareness in the minds of the defendants—or, to be more precise within the context of the present motion, what discovery procedures he may legitimately summon to his aid.

## V.

The Court observed at the beginning of this opinion that the question presented is, in substantial part, one of first impression. That is because, with a sole exception, the defamation cases cited in the briefs of counsel deal with the totality of the evidence adduced on the merits. That is to say, these cases arise on motions for summary judgment, or on motions or appeals after trial. Only one case focuses upon the appropriate boundaries of discovery within the context of a "public figure" defamation suit, and it is limited to discovery of documents.

That case is *Buckley v. Vidal*, 50 F.R.D. 271 (S.D.N.Y. 1970), a decision by Judge Levet of this court. Plaintiff alleged that he had been defamed by the defendant's statements in television programs, and in articles appearing in magazines. The plaintiff sought production, under Rule 34, of a wide variety of manuscripts, correspondence, notes, memoranda and other material prepared by defendant or exchanged between defendant and the magazines and television station in question, editors, agents, or employees, or persons engaged as investigators by the defendant, or relating in any manner to the statements in suit. The defendant interposed First Amendment objections; and also argued that plaintiff had failed to show "good cause" for the production, and that certain of the documents were covered by the attorney-client privilege.

Judge Levet overruled the first two objections, and reserved his ruling on the third for an *in camera* examination of the documents as to which privilege was asserted. On the First Amendment point, he commented on the heavy burden

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of proof borne by a plaintiff in such cases, and viewed that burden as a basis for liberal pre-trial discovery:

"In the case at bar, it seems that plaintiff is obligated to delve into the realm of defendant's conduct, motivation and belief in order to recover, at least with regard to statements directed to public conduct of the plaintiff.

"Although in recent years the Supreme Court has placed stringent burden of proof requirements on a public official or public figure suing for defamation, such plaintiffs may still recover if they sustain their heavy burdens. As long as a cause of action for defamation passes constitutional muster, a plaintiff must be allowed reasonable opportunity for discovery. Defendant's objection to production and inspection on broad First Amendment grounds is therefore overruled." 50 F.R.D. at 273-4.

On the "good cause" objection, the court said, in directing disclosure of material received by defendant concerning plaintiff for a period of six years prior to the publications in suit:

"In light of the nature of this action and the burden of proof that may be imposed on plaintiff, as discussed above, I do not believe the 1962 date is too remote." 50 F.R.D. at 274.

In keeping with the rationale of *Buckley v. Vidal*, I conclude that a "public figure" plaintiff in a defamation action is entitled to liberal interpretation of the rules concerning pre-trial discovery. I intimate no view on the merits of the present case; but one cannot close one's eyes to the possibility of malicious publications or statements concerning public figures. If the malicious publisher is per-

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mitted to increase the weight of the injured plaintiff's already heavy burden of proof by a narrow and restricted application of the discovery rules, so that the plaintiff is denied discovery into areas which in the nature of the case lie solely with the defendant, then the law in effect provides an arras behind which malicious publication may go undetected and unpunished. Nothing in the First Amendment requires such a result.

There is another general principle applicable to this case in its present stage of development. Defendants argue in their briefs that many of the areas into which Herbert wishes to inquire would not constitute admissible evidence, in the light of the pertinent cases. Some of these contentions are considered further *infra*. But it may be noted generally that, under Rule 25(b)(1), F.R.C.P.:

"It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

Courts have given a broad scope to this language, which was added to the Rule by amendment. 4 *Moore's Federal Practice* (2d ed. 1976), ¶26.56[5] at p. 26-179. Judge Lumbard, concurring in *United States v. Matles*, 247 F.2d 378, 383 (2d Cir. 1957), *rev'd on other grounds*, 356 U.S. 256, said:

"This language [Rule 26(b)] is clearly designed to be broad enough to cover almost anything that will help the examining party to discover any leads to evidence."

It is, of course, true that the matter as to which discovery is sought be "relevant" to the subject matter of the action. In the light of these principles, I turn to the particular areas of dispute.

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## VI.

The first five areas of dispute, listed on page 6 *supra*, relate to Lando's conclusions, opinions and intentions, formulated during the period of time that he was researching and preparing the television program and the Atlantic article, with particular reference to people or leads to be pursued or not to be pursued, the veracity of persons interviewed, and the reasons why certain material was included or excluded. Lando was repeatedly instructed by counsel not to answer such questions during his deposition (the inquiries in question appear in Appendix A to defendants' main brief).

Defendants interpose a broad-scale objection to these lines of inquiry. They contend that inquiry into opinions, conclusions, the basis of conclusions, and intent cannot be permitted because it is irrelevant, constitutes a violation of First Amendment privilege and also the privilege of "editorial judgment".

I reject these contentions. Where, as here, the defendant's state of mind is of central importance to a proper resolution of the merits, it is obvious that these lines of inquiry may lead, directly or indirectly, to admissible evidence. As in all cases, civil or criminal, turning upon the state of an individual's mind, direct evidence may be rare; usually the trier of the facts is required to draw inferences of the state of mind at issue from surrounding acts, utterances, writings, or other indicia. In *Goldwater v. Ginzburg*, 414 F.2d 324, 342 (2d Cir. 1969), *cert. den.*, 396 U.S. 1049, the Court made this point forcibly in considering the trial judge's charge:

"The trial court, appellants also argue, erroneously permitted the jury to find actual malice from evidence of negligence and ill will. The record is to the contrary. The court below not only charged the jury but

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also emphasized in the charge that neither negligence nor failure to investigate, on the one hand, nor ill will, bias, spite, nor prejudice, on the other, standing alone, were sufficient to establish either a knowledge of the falsity of, or a reckless disregard of, the truth or falsity of the materials used. Moreover, the court properly instructed the jurors that they should consider *all the evidence concerning appellants' acts and conduct* in publishing Fact in deliberating upon whether the defendants published with actual malice. There is no doubt that *evidence of negligence, of motive and of intent* may be adduced for the purpose of establishing, *by cumulation and by appropriate inferences*, the fact of a defendant's recklessness or of his knowledge of falsity. See, e.g., *Curtis Publishing Co. v. Butts, supra.*" (emphasis added).

The publisher's opinions and conclusions with respect to veracity, reliability, and the preference of one source of information over another are clearly relevant. It is no answer for the defendants to say that they accurately repeated the words of certain of their interviewees. In *Goldwater v. Ginzburg, supra*, the Second Circuit observed:

"Repetition of another's words does not release one of responsibility if the repeater knows that the words are false or inherently improbable, *or there are obvious reasons to doubt the veracity of the person quoted or the accuracy of his reports.* *St. Amant v. Thompson, supra* at 732, 88 S.Ct. 1323." 414 F.2d at 337 (emphasis added).

The lines of inquiry under discussion are entirely appropriate to Herbert's efforts to discover whether Lando had any reason to doubt the veracity of certain of his sources, or, equally significant, to prefer the veracity of one source

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over another. It is quite apparent that Col. Herbert, at the times in question, was a controversial figure, highly regarded in certain quarters, but viewed with considerably less favor in others. Herbert is entitled to full discovery on these lines of inquiry. He is equally entitled to discovery on whether Lando's investigation and research was negligent, and the lines of inquiry under consideration bear upon this issue as well. Nothing in the *Times* case or its progeny holds that evidence of negligence can never be relevant or admissible on the issue of malice. The Second Circuit also makes this clear in *Goldwater v. Ginzburg*:

"As already stated, *supra*, *Times* does not hold that evidence of negligence is inadmissible; it only holds that evidence which merely establishes negligence in failing to discover misstatements, without more, is constitutionally insufficient to support the finding of recklessness required to establish actual malice from proof of less than prudent conduct. Recklessness is, after all, only negligence raised to a higher power. To hold otherwise would require that plaintiff prove the ultimate fact of recklessness without being able to adduce proof of the underlying facts from which a jury could infer recklessness. It would limit successful suits to those cases in which there is direct proof by a party's admission of the ultimate fact, certainly a situation not intended by the Supreme Court. See *St. Amant v. Thompson*, *supra*, 390 U.S. at 732-733, 88 S.Ct. 1323," 414 F.2d at 343.

See also *Time, Inc. v. Hill*, 385 U.S. 374 (1967), and in particular the discussion under Point II, pp. 391-4, in which the Supreme Court considers the sort of activities, evaluations and opinions on the part of a publisher or its representatives which could permit the trier of the fact to draw the inference of reckless disregard of truth.

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Finally, under this heading, I find no substance in the argument defendants base upon the "editorial judgment" concept. Cases such as *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) and *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973), deal with statutes or regulations purporting to specify what newspapers or broadcasting stations must print or say. *Branzburg v. Hayes*, 408 U.S. 665 (1972), deals with a newspaper reporter's obligation to respond to a grand jury subpoena and inquiry. These cases have nothing to do with the proper boundaries of pre-trial discovery in a defamation suit alleging malicious publication.

VII.

Items 6 and 7 of the disputed issues (p. 6 *supra*) relate to conversations between Lando and source persons subsequent to the inception of the action; and to Lando's activities as well as conversations between Lando, Wallace or other CBS employees concerning Herbert or the television program, between broadcast and publication of the Atlantic Monthly article.

Defendants object to these lines of inquiry on the basis that inquiry into post-publication activities, writings or statements is irrelevant, and cannot possibly lead to the discovery of admissible evidence.

I cannot accept this latter proposition. As noted above, the case turns upon subjective aspects of the defendant's state of mind. To be sure, it is the state of mind at the time of publication that controls; but how can it reasonably be contended that post-publication statements or activities *could not* form the basis for an inference as to pre-publication state of mind? I do not say that such evidence will be adduced; I only hold that, under the discovery rules, Herbert is entitled to inquire. It is well settled that statements after the act, stating the past in-

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tent or motive at the time of the act, are usable against a defendant as admissions. 6 *Wigmore on Evidence* (3rd ed. 1940) at §1732, p. 103. See also *Glasser v. United States*, 315 U.S. 60 (1941) (alleged conspiracy on part of government prosecutors and private counsel to defraud United States in respect of prosecution of liquor cases; evidence was admitted that a defendant, one Roth, asked an Assistant United States Attorney to use his influence to stop the investigation; this evidence held admissible: "The statements of Roth were not in furtherance of the conspiracy, but they did tend to connect Roth with it by explaining his state of mind." 315 U.S. at 82.) Compare *United States v. Matot*, 146 F.2d 197 (2d Cir. 1944) (in prosecution for bank fraud, where fraudulent intent was a necessary element of the crime, held it was error to exclude evidence of accused's subsequent interview with bank president, since conversation could be read as "confirmation of his denial that he had ever contemplated a fraud," 146 F.2d at 198).

Furthermore, in the case at bar defendant Lando was directly concerned with two publications: the television broadcast on February 4, 1973, and the Atlantic article in May, 1973. Obviously, the activities of Lando during this interim period of time are relevant. In *Airlie Foundation, Inc. v. Evening Star Newspaper Co.*, 337 F.Supp. 421 (D.D.C. 1972), the court considered a several-publication libel suit. The court noted the possibility that "the publisher's initial evaluation of his story and his decision to publish will be undercut by subsequent developments." The court in *Airlie* recognized that, under Supreme Court holdings, later events "may have no probative value as they relate to earlier publications", citing *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 55 (1971); and that information revealed after the first publication, insofar as it bears on the publisher's investigative efforts, need not

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necessarily be taken as evidence of malice, citing the *Times* decision at 376 U.S. 287. But the court went on to observe, in a discussion which illuminates the considerations pertinent to the present case:

"But while it is well established that a failure to investigate, without more, is insufficient to give rise to liability, once one has undertaken to conduct an investigation he should not be permitted to ignore with impunity the fruits of that investigation . . .

"Here the defendant attempted to obtain confirmation or denial of the charges from the Director of the CIA after initial publication. The Star's editor testified that he received an emphatic denial, one which, in his own words, left him 'considerably shaken.' Nevertheless, the Star again published an account of the Higgs press conference the following day. While the headline featured Dr. Head's denial, the text included several details not raised by Higgs, including, among others, the CIA refused to comment. Faced with this testimony and evidence there was a basis established with convincing clarity upon which the jury might well have concluded these details were known by the Star to be false and were added by it to lend credence to the Higgs charges at a time when it entertained serious doubts as to the validity of those charges. Accordingly, the Court concludes that the evidence was sufficient to go to the jury on the question of whether the Star published 'with knowledge that it was false or with reckless disregard of whether it was false or not' as required by the New York Times case." 337 F.Supp. at pp. 427-8.

Again, I of course express no view as to whether Herbert will succeed in developing any useful evidence as

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the result of post-publication inquiry. I hold only that he is entitled to such inquiry under the discovery rules.

## VIII.

The next disputed item involves a CBS memorandum prepared by one of its "house" attorneys under the following circumstances.

During his deposition, Lando testified that sometime after the broadcast Col. Franklin telephoned him. Franklin told Lando he was contemplating an action against Herbert, and asked if his (Franklin's) attorney could talk to Lando. Lando replied that he did not know; he would "have to check with CBS to see" (722). Lando testified:

"The information that I conveyed to CBS was that Franklin's attorney had contacted me—by that time Franklin had contacted me, told me he was bringing suit over the book, and wanted to know if I would speak to his attorney to give him information. I believe that is what I relayed to CBS." (725).

Lando's inquiry produced the document under consideration. It is a memorandum dated July 17, 1973, written by Michael J. Goldey, an attorney on the staff of the CBS Law Department. The memorandum was addressed to (1) David Klinger, Vice President and Assistant to the President of CBS News, and in charge of liaison between the Law and News Departments; (2) Don Hewitt, the executive producer of the 60 MINUTES program; and (3) Joseph M. Walsh, the General Attorney, Publishing, with initial responsibility for rendering legal advice on matters relating to CBS's publishing operations. Copies of the memorandum were sent to John D. Appel (Deputy General Counsel), Ralph E. Goldberg (General Attorney for Governmental Affairs), and Lando.

The thrust of the memorandum, Lando testified, was "that my position would be that there would be no con-

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tact, no information given to Franklin or his attorney for this suit" (724). Accordingly Lando advised Franklin's attorney that "I could not give them any information whatsoever" (722).

CBS, Lando and Wallace invoke the attorney-client privilege in respect of this memorandum. Herbert contends that, in the circumstances of the case, the privilege either does not apply or has been waived.

I start with the observation that the memorandum in question is a communication from an attorney to a client,<sup>1</sup> and not from a client to an attorney. The distinction is significant, because of the rationale underlying extension of the privilege to the attorney's communications. "The reason for it", says Wigmore,<sup>2</sup> "is not any design of securing the attorney's freedom of expression, but the necessity of preventing the use of his statements as admissions of the client, or as leading to inferences of the tenor of the client's communications . . ."

In *United States v. Silverman*, 430 F.2d 106 (2d Cir. 1970), *cert. den.*, 402 U.S. 953 (1971), the Second Circuit held that no privilege attached to minutes delivered by a client to its attorney, because the minutes were a matter of public record. The court applied and interpreted Wigmore's analysis:

"The privilege as commonly formulated refers to a confidential communication from the client to the attorney. 8 Wigmore, Evidence §2292 (McNaughton rev. ed. 1961); compare Uniform Rule of Evidence 26 ('between lawyer and his client'). Wigmore states that the reason for bringing communications from the at-

<sup>1</sup> The attorney-client relationship extends to "house" counsel and members of the corporate control group. *Burlington Industries v. Exxon Corp.*, 65 F.R.D. 26 (D.Ind. 1974).

<sup>2</sup> 8 Wigmore on Evidence (McNaughton rev., 1961), §2320, p. 629.

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torney to the client within the privilege is to prevent adopted admissions or inferences of the tenor of the client's communication. 8 Wigmore, Evidence §2320 (McNaughton rev. ed. 1961). The purpose of the privilege, the encouragement of full disclosure to the attorney in procuring legal advice, implies that a communication from an attorney is not privileged *unless it has the effect of revealing a confidential communication from the client to the attorney.*" 430 F.2d at 122 (emphasis added).

Judge Moore's opinion quotes with approval this discussion from *United States v. United Shoe Machinery Corp.*, 89 F.Supp. 357, 359 (D.Mass. 1950):

"It follows that in so far as these letters to or from independent lawyers were prepared to solicit or give an opinion on law or legal services, such parts of them are privileged *as contain, or have opinions based on, information furnished by an officer or employee of the defendant in confidence and without the presence of third persons.* \* \* \*

"However, \* \* \* there is no privilege for so much of a lawyer's letter, report or opinion as relates to a fact gleaned from \* \* \* a public document such as a patent, cf. *Edison Electric Co. v. United States Electric L[ighting] Co.*, [44 F. 294 (C.C.S.D.N.Y. 1890)]." (emphasis added).

Another statement of the underlying rationale appears in *Georgia-Pacific Plywood v. United States Plywood Corp.*, 18 F.R.D. 463, 464 (S.D.N.Y. 1956):

"Since communications by the attorney to the client might reveal the substance of a client's communication they are also within the privilege." (emphasis added).

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In *United States v. International Business Machines Corp.*, 66 F.R.D. 206 (S.D.N.Y. 1974), Chief Judge Edelstein reviewed these authorities and concluded:

"In light of the clear guidance from the Second Circuit on this matter and because the approach recommended by the Masters coincides with the purpose of the attorney-client privilege, this court is constrained to reject defendant's formulation of the attorney-client privilege as it applies to communications from lawyers to their clients. This court will abide by the view that such communications are privileged *only to the extent that they reveal confidential information communicated by the client to the lawyer.* Accordingly, the proper focus of the Masters' inquiry must be whether or not the document as to which privilege is claimed can be said *to reveal such a communication.*" 66 F.R.D. at 212 (emphasis added).

Applying these principles to the case at bar, it is apparent that certain difficulties arise with respect to defendants' claim of privilege. The memorandum in question does not automatically achieve privileged status because its author was an attorney. Nor is privileged status automatically conferred by the fact that the memorandum may express an opinion of counsel; opinions are privileged only to the extent that they are based upon, and consequently reveal, information furnished by the client in confidence.

In the case at bar, it is somewhat difficult to see how Lando's inquiry, prompted by the telephone call from Col. Franklin, can be viewed as "confidential information communicated by the client to the lawyer", *United States v. International Business Machines Corp.*, *supra*. It is not even certain that Lando directed his inquiry to one of the CBS legal staff; he speaks only in terms of conveying

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the information of Franklin's request "to CBS". But we may assume that Lando directed his inquiry to a member of the legal staff; in any event, the question ultimately found its way there, and was apparently dealt with by Mr. Goldey. But the question remains: How can it be said that disclosure of the memorandum would have "the effect of revealing a confidential communication from the client to the attorney", in the words of *United States v. Silverman, supra*? Lando's communication has already been revealed in his deposition testimony: "Franklin is thinking of suing Herbert, and wants me to talk to his attorney—shall I do it?" Revelation of that inquiry having already been accomplished, there is no basis for contending that the responsive memorandum is privileged because it might tend to reveal the inquiry.

It may be, however, that the contents of the memorandum contain information, comments, or opinions which are based upon or reveal confidential communications addressed to counsel by other CBS officers or employees. The Court cannot determine this question without examining the document. Accordingly, counsel for the defendants are directed to furnish the Court with a copy for inspection *in camera*. There is ample authority for proceeding in that manner. See *In Re Grand Jury Subpoena Duces Tecum*, 391 F.Supp. 1029, 1033 (S.D.N.Y. 1975).

Herbert also argues that the memorandum is beyond the scope of the attorney-client privilege because (a) it deals with business advice, rather than legal advice; and (b) Lando is not within the "control group" of CBS employees, so that, at the very least, the forwarding of a copy of the memorandum to him waived the privilege. I reject these arguments. Lando's inquiry was clearly intended to evoke legal, not business or professional, advice. Franklin contemplated litigation against Herbert; Lando was asked to confer with Franklin's attorney; the Legal

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Department of CBS took the question under advisement. Potential lawsuits and actual attorneys were in the air; this is the atmosphere within which counsel live, move, and have their being. It is unreasonable to characterize the incident as one involving business or professional advice. As for the "control group" contention, giving full force to that line of authority and assuming without deciding that Lando falls outside the group, the individuals to whom the memorandum was addressed clearly fall within the group, and I decline to hold that the receipt by Lando of a copy constitutes a waiver binding upon all defendants, individual and corporate.

IX.

The discovery disputes between Herbert and the defendant Atlantic concern the following two items:

(1) Herbert's request for discovery of Atlantic's communications with its counsel on the subject of the Lando article printed in Atlantic in May, 1973, such communications having taken place prior to publication; and

(2) Herbert's request for discovery of Atlantic's internal communications and communications with Lando, subsequent to the receipt by Atlantic of a "bill of discrepancies" prepared by Herbert's literary agent, one Gerard McCauley, and sent to Atlantic more than four months after publication.

These disputes are considered in order.

While the subject of pre-publication communications between Atlantic and its attorney, Conrad Oberdorfer, Esq., of the firm of Choate, Hall & Stewart in Boston, has generated considerable discussion in the briefs, it would appear that we are concerned with only one communication. It appears from the affidavit of Robert Manning, the Editor-in-Chief of Atlantic, that on March 9, 1973

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he received a letter from Mr. Oberdorfer. Mr. Oberdorfer wrote to Manning, presumably in response to the latter's prior request, in order to give his advice on the proposed Lando article, and to recommend that Manning raise certain questions about the article with Lando. Manning sent Oberdorfer's letter on to Lando for his comments. The forwarding by Atlantic of counsel's letter to Lando, of course, waived any attorney-client privilege that might otherwise have obtained; and Atlantic has quite properly produced the March 9 Oberdorfer letter to Manning, and Atlantic's forwarding letter of March 13 to Lando, for inspection by Herbert. Manning's affidavit recites that, apart from these two letters, "Atlantic had only one communication with its attorney during the pre-publication period. This was a brief letter from Atlantic to Mr. Oberdorfer during the period before Oberdorfer's March 9, 1973 letter." The Court has no basis to doubt Mr. Manning's sworn statement, and plaintiff suggests none. Accordingly this area of dispute appears to be limited to that one "brief letter" from Atlantic to its counsel, written before the March 9, 1973 letter from counsel to Atlantic which has already been produced.

There is substantial authority for the proposition that voluntary disclosure of privileged matter to a third party waives the privilege, at least with respect to the particular subject matter involved in the disclosure.

In *In Re Penn Central Commercial Paper Litigation*, 61 F.R.D. 453, 464 (S.D.N.Y. 1973), this court said in an opinion by Chief Judge Edelstein:

"The theoretical predicate underlying all recognized privileges is that secrecy and confidentiality are necessary to promote the relationship fostered by the privilege. Once the secrecy or confidentiality is destroyed by a voluntary disclosure to a third party,

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the rationale for granting the privilege in the first instance no longer applies."

The court added that "a claim of privilege cannot be selectively waived", citing, among other cases, *Lee National Corp. v. Deramus*, 313 F.Supp. 224 (D.Del. 1970), in which the court held that a party's free and voluntary revelation of otherwise privileged communications with its counsel on a particular subject matter (by-law and charter amendments) constituted a waiver of the attorney-client privilege with respect to that particular subject matter. The court observed:

"Fairness demands that all occasions when this subject matter was discussed with counsel be revealed."  
313 F.Supp. at p. 227.

In the case at bar, Atlantic requested counsel's advice in respect of the intended Lando article. Counsel's response, in the form of the March 9, 1973 letter, was then voluntarily disclosed by Atlantic to a third party, namely, Lando. Assuming *arguendo* that the March 9 letter was originally privileged, the privilege was lost by disclosure to Lando. It follows that any pre-publication communications between Atlantic and its counsel on that particular subject matter are no longer protected by the privilege. If the pre-March 9 "brief letter" from Atlantic to counsel deals with the same subject matter as the March 9 letter, then the prior letter must be revealed.<sup>3</sup> In order that a proper determination may be made, I direct that the Court be furnished with a copy of the letter in question for examination *in camera*.

The post-publication discovery disputes involving Atlantic turn upon quite different facts. Printed copies of

<sup>3</sup> See also *Garfinkle v. Arcata National Corp.*, 64 F.R.D. 688, 689 (S.D.N.Y. 1974).

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the May, 1973 issue of the Atlantic magazine became available in mid-April. It appears from the affidavit of C. Michael Curtis, an associate editor of Atlantic, that copies of the issue were sent, as soon as they became available, on April 17, 1973 to Herbert, his literary agent McCauley, and certain other individuals. Atlantic took this action because of a prior request it received from McCauley, in the latter part of March, 1973, McCauley having evidently learned of the intended Lando article, and having asked if Atlantic could print a reply by Herbert in the same issue. Curtis had advised McCauley that such an arrangement could not be made.

Ultimately, McCauley forwarded to Curtis, as an enclosure to a letter dated August 16, 1973, a typed list of 27 "discrepancies" in connection with the Lando article which appeared in Atlantic. These "discrepancies" consist, in sum, of Herbert's points of disagreement with factual assertions in the Lando article. This document was accompanied by 44 pages of documentation intended to support Herbert's position. McCauley's forwarding letter to Curtis describes the enclosure as "a list of 27 items which seem to contradict Barry Lando's article"; the letter concludes:

"... I look forward to receiving some response from *The Atlantic*."

The Curtis affidavit says:

"Upon receipt of the 'bill of discrepancies', I sent copies both to defendant Barry Lando, the author of the article, and to Atlantic's counsel, and discussed it with other editors at the Atlantic. This was followed by communications back and forth, primarily in writing, concerning Herbert's charges as itemized by McCauley and the way in which those charges might be met. It is such communications, undertaken when

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we knew that litigation was likely, and with a view to deciding how we should answer plaintiff's charges, that plaintiff now seeks to discover."

As appears from the Curtis affidavit, Atlantic takes the position that the Herbert list of discrepancies was compiled by Herbert in anticipation of suing Atlantic, so that Atlantic's subsequent communications, prompted by the Herbert list, are vested, in addition to customary attorney-client privilege, with the protection afforded by Rule 26(b)(3), F.R.C.P.

Herbert denies that his list of discrepancies was prepared at a time when he was contemplating litigation against Atlantic. He ascribes to other reasons the fact that he did not reply to the Atlantic article until four months after Atlantic had sent him a copy (Atlantic relies upon this delay as evidence of Herbert's intention to litigate, rather than to obtain a correction from Atlantic).

I conclude, without undue difficulty, that the communications referred to were made "in anticipation of litigation", as that phrase is used in Rule 26(b)(3). Of course, it is not decisive on the issue that Col. Herbert had not yet commenced suit against Atlantic. In the landmark case of *Hickman v. Taylor*, 329 U.S. 495, 511 (1947), the Supreme Court stated that the work-product privilege extends to those documents prepared "with an eye toward litigation". This court has said, in *Stix Products, Inc. v. United Merchants & Manufacturers, Inc.*, 47 F.R.D. 334, 337 (1969):

"If the prospect of litigation is identifiable because of specific claims that have already arisen, the fact that, at the time the document is prepared, litigation is still a contingency has not been held to render the privilege inapplicable."

Herbert's list of discrepancies, while not referring specifically to an intent to litigate, may certainly be regarded as

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"specific claims" that he caused to arise in respect of the Lando article. Professor Wright reminds us:

"Prudent parties anticipate litigation, and begin preparation prior to the time suit is formally commenced. Thus the test should be whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation." 8 Wright and Miller, *Federal Practice and Procedure* (1970) at §2024, p. 198.

Herbert's communication to Atlantic clearly gave rise to the "prospect of litigation", and it would have been imprudent for Atlantic to conclude otherwise. Communications may be characterized as having been carried on "with an eye toward litigation", even though they were prompted by a desire to avoid, and not prepare for, a possible suit. *Vilastor-Kent Theater Corp. v. Brandt*, 19 F.R.D. 522 (S.D.N.Y. 1956). While a showing of a "remote possibility of litigation" is not sufficient to invoke Rule 26(b)(3), *Garfinkle v. Arcata National Corp.*, 64 F.R.D. 688, 690 (S.D.N.Y. 1974), I conclude that the present case cannot be so characterized. This is so, even accepting Herbert's statement that "in going over the errors in Lando's article with McCauley", he did not contemplate a lawsuit at that time. The seeds of prospective litigation had been sown; they ultimately came to fruition; and I cannot agree with plaintiff that, once Herbert's communication had been received by Atlantic, the prospects of the litigation which eventually came to pass were so remote that the Rule does not apply.

However, that is not an end of the inquiry. Rule 26(b)(3) permits discovery of "documents and tangible things" covered by the Rule, upon a showing by the party seeking the discovery that he "has substantial need of the materials

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in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means."<sup>4</sup> The only mandatory protection afforded by the Rule appears in its last sentence, which directs the trial court to "protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."

I hold that, in the circumstances of this case, Herbert has made the requisite showings of need and hardship. While Atlantic argues that post-publication communications cannot possibly be relevant, I have reached a contrary conclusion with regard to the other defendants' comparable argument (see Point VII, *supra*), and reach the same conclusion here. In this regard, I cannot wholly accept Atlantic's characterization of itself as nothing but a "conduit" through which Lando was expressing his views. The article, Exhibit B to the complaint, is entitled: "The Herbert Affair, by Barry Lando". The article is prefaced, however, by the following paragraph, presumably the "work product" of an Atlantic editor, and not Lando:

<sup>4</sup> Rule 26(b)(3) provides in full:

"Trial Preparation: Materials. Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."

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"He seemed to be the perfect soldier, a hero in Korea and in Vietnam. Then he was driven out of the Army, his career ruined because he tried to prevent his superiors from concealing war crimes against the Vietnamese. That was the story a television producer persuaded his superiors at CBS should be presented to a nationwide audience. As the producer and his associates began assembling the facts, they found it changing into a very different story, one that left the reporter disillusioned and the hero threatened with decanonization. The producer here tells how the case unfolded for him, from his first, convincing interviews with Lieutenant Colonel Anthony Herbert, through intensive researching of Herbert's alarming charges against fellow Army officers, to a dramatic confrontation between Herbert and some of those who disputed him on the CBS program, *Sixty Minutes*, shown on February 4 of this year. It is a tangled story, to say the least. One of its lesser anomalies: Herbert's book *Soldier*, now profitably riding the best-seller list, is published by Holt, Rinehart and Winston, which is owned by CBS, the organization that has done the most to attack the book's integrity."

While perhaps stopping short of placing its own *imprimatur* upon the truth of Lando's assertions, Atlantic's references to "intensive researching" by Lando which "left the reporter disillusioned and the hero threatened with decanonization" may have served to give that impression. In any event, it is apparent that post-publication communications, involving Atlantic and other members of its corporate family, or Atlantic and Lando, may lead to the discovery of admissible evidence on the issue of pre-publication state of mind, on the part of both Lando and the Atlantic editors.

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In consequence, the Court's ruling on this aspect of the case is that counsel for Atlantic are to submit to the Court all pertinent documents for *in camera* inspection, so that the protection mandated by the last sentence of the Rule can be assured. In respect of any continued or future oral depositions, counsel for plaintiff are directed not to inquire in respect of "the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative" of Atlantic "concerning the litigation"; and Atlantic's witnesses are not obliged to answer such questions if asked.

X.

The final area of dispute relates to Herbert's demand for production of:

"... documents in the possession of CBS news, Wallace or Lando during the period June 1, 1971 to February 4, 1973 (to May, 1973 in regard to Lando) regarding Col. Herbert, the 173rd Airborne Brigade while in Vietnam, individuals appearing or referred to on the 60 MINUTES segment and events described in *Soldier* ... which were not specifically known to Wallace and Lando at the time the program was being produced."

Herbert's counsel contends that such documents, even if not specifically known to Wallace or Lando at the time of production of the telecast, nevertheless may lead to the discovery of admissible evidence relating to whether the defendants "published the charged libel in reckless disregard of its truth or falsity." (affidavit of counsel, para. 3).

The defendants contend that documents in the files of the corporate or individual defendants, of which the individual defendants were not aware at the time of publication, cannot possibly be relevant in respect of their state of mind at the time of publication. Particular reliance is

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placed upon *New York Times v. Sullivan, supra*, in which it was said:

"Finally, there is evidence that the Times published the advertisement without checking its accuracy against the news stories in the Times' own files. The mere presence of the stories in the files does not, of course, establish that the Times 'knew' the advertisement was false, since the state of mind required for actual malice would have to be brought home to the persons in the Times' organization having responsibility for the publication of the advertisement. With respect to the failure of those persons to make the check, the record shows that they relied upon their knowledge of the good reputation of many of those whose names were listed as sponsors of the advertisement, and upon the letter from A. Philip Randolph, known to them as a responsible individual, certifying that the use of the names was authorized. There was testimony that the persons handling the advertisement saw nothing in it that would render it unacceptable under the Times' policy of rejecting advertisements containing 'attacks of a personal character'; their failure to reject it on this ground was not unreasonable. We think the evidence against the Times supports at most a finding of negligence in failing to discover the misstatements, and is constitutionally insufficient to show the recklessness that is required for a finding of actual malice." 376 U.S. at p. 287-8.

While this Court fully recognizes the impact of the *Times* decision, the particular language of the opinion must be considered within the context of the facts of the case. The alleged libel in *Times* consisted of a full-page advertisement that the newspaper carrier, which included statements, some of them false, about police action allegedly

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directed against students who participated in a civil rights demonstration. The newspaper published the advertisement upon an order from a New York advertising agency acting for the signatory committee; the agency submitted the advertisement with a letter from A. Philip Randolph, chairman of the committee, and well known to the Times advertising acceptability department as a responsible person. Mr. Randolph certified that the persons whose names appeared on the advertisement had given their permission.

In the case at bar, the Herbert story did not come to CBS, Lando or Wallace unsolicited and through the mail. On the contrary, it was at Lando's initiative that the Herbert story came into being; he did the investigations; and CBS and Wallace, together with Lando, worked together in assembling and putting on the air the program which resulted from Lando's efforts. This situation, in my judgment, is quite different from the fact situation presented in *Times*, which turned upon the question of whether members of the advertising department should have checked the files of the news department in respect of statements in an advertisement which had come, unsolicited and entirely without their own inquiry into the facts, to the attention of the advertising department.

In *Goldwater v. Ginzburg, supra*, the Second Circuit considered the contention of the defendants that the trial court erred in permitting the head of a public opinion survey organization to testify that the defendants did not use a valid method of conducting the poll of psychiatrists to which they referred in their unflattering article about Senator Goldwater. That evidence, the defendants argued, was irrelevant "for at most it would only tend to show that appellants were negligent pollsters." 414 F.2d at 343. The Second Circuit disagreed, observing that the *Times* case "does not hold that evidence of negligence is inadmissible; it only holds that evidence which merely establishes neg-

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ligence in failing to discover misstatements, *without more*, is constitutionally insufficient to support the finding of recklessness required to establish actual malice from proof of less than prudent conduct." 414 F.2d at 343 (emphasis added).

As previously noted, *Goldwater v. Ginzburg* teaches that evidence of reckless disregard for truth must be viewed in its totality. Thus, as one of the elements in that case "tending to prove actual malice", the Second Circuit observed that "the seriousness of the charges called for a thorough investigation but the evidence reveals only the careless utilization of slipshod and sketchy investigative techniques." 414 F.2d at 339.

If, as *Goldwater v. Ginzburg* indicates, the utilization of "slipshod and sketchy investigative techniques" can be considered as evidence of actual malice, then the question arises: Could the material sought by discovery lead to the development of such evidence? The concept is stated in terms of possibility, since that is the context within which requests for discovery must necessarily be viewed. The Court concludes that the question must be answered in the affirmative. Assume, for the sake of discussion, that the CBS telecast contained false statements concerning Herbert, the falsity of which would have been demonstrated by documents then in possession of CBS, Lando or Wallace. The *Times* decision does not brand as inadmissible the failure of an investigatory reporter to consult the files of his own newspaper (or television news facility) before publishing a false and defamatory statement which examination of those files would have prevented.<sup>5</sup> Again, I do not

<sup>5</sup> One may hypothesize a situation from another chapter of military history. Assume that, following Custer's defeat at the Little Bighorn, an investigative reporter for a leading newspaper researched the causes of the defeat, and wrote an article which his newspaper printed, which advanced the proposition that Major Reno withdrew, not as the result of Indian action, but because of

## Appendix B—Memorandum and Order

say that such facts actually exist in the case at bar; but Herbert is entitled to inquire.

However, the scope of inquiry indicated by the affidavit of counsel for plaintiff, at para. 3, is unduly broad, and compliance would be too burdensome to the defendants to justify full compliance. Production is demanded of documents "regarding Col. Herbert, the 173rd Airborne Brigade while in Vietnam, individuals appearing or referred to on the 60 MINUTES segment, and events described in *Soldier*." Quite obviously, there could be many references in the files to the Brigade's service in Vietnam which would have nothing to do with this litigation. That is equally true of events described in Col. Herbert's book. Plaintiff is entitled to discovery of such documents as might exist in the files, and which relate specifically to the contents of the telecast and the article in *Atlantic*.

---

the ill-advised order of one General X who was in the area and inserted himself into the chain of command. Assume further that, at the time of publication, the newspaper's files contained stories demonstrating that, when the battle occurred, General X was in Europe on a military mission. I cannot accept that, in General X's subsequent suit for defamation against the reporter and the newspaper, such a disregard of readily available information would not be admissible as one possible indication, to be considered by the trier of the fact together with any other indicia, on the question of reckless disregard for the truth. (I am further assuming for this discussion that General X was a "public figure", and that the *Times* case and its progeny had been decided by the Supreme Court at the time of Custer's last stand.) The distinction lies, as the Second Circuit points out in *Goldwater v. Ginzburg*, *supra*, between the insufficiency of negligent investigation standing alone, and its admissibility into evidence as one factor among several, on the issue of reckless disregard. The present defendants argue, in essence, that because negligent investigation without more is not sufficient in law to establish reckless disregard, it cannot be considered, together with other elements, as part of the overall proof. That is a *non-sequitur*, and the missing link in the chain of logic is supplied neither by *Times* and its progeny nor the First Amendment.

*Appendix B—Memorandum and Order*

For the guidance of counsel in implementing this opinion, I direct that documents in the following categories, existing in the indicated files at the indicated times, be produced:

1. Any documents prepared by, pertaining to or mentioning Herbert; John Barnes; Ross Franklin; John Douglas; a Col. Rector; Kenneth Rosenblum; Richard Heintz; Bruce Potter; Robert Stemmies; Michael Plantz; William Hill; James Grimshaw; John Bettorie.

2. Any documents pertaining to or mentioning the February 14, 1969 "St. Valentine's Day Massacre" in Viet Nam.

3. Any documents pertaining to or mentioning the presence or absence of Col. Franklin in Viet Nam on February 14, 1969, including references to individuals interviewed on that subject.

4. Any documents referring to the service of the 173rd Airborne Brigade in Viet Nam during Herbert's tour of duty there.

These categories are not intended to be all-inclusive. They are intended, however, to demonstrate that the defendants are not obligated to produce reams of material which have no direct bearing upon the issues posed by the allegedly libelous publications.

**XI.**

Herbert also contends that Lando, during his deposition, failed to respond fully to questions which were not made the subject of objections. Since the hearing on this case, counsel for Herbert have withdrawn a number of demands that further answers be furnished. I have examined the remaining questions, and agree with plaintiff's counsel that the answers previously given do not entirely track with

*Appendix B—Memorandum and Order*

the questions. Presumably, as the result of this opinion, Mr. Lando will be deposed further. Plaintiff's counsel may, if they wish, again put the questions under consideration to Mr. Lando, and further answers will be required.

**XII.**

The foregoing constitutes the Court's order in this matter. I perceive no present need for the settlement of a further order. Counsel for the parties should be able to proceed in the case, in a manner consistent with this opinion and order. However, should the necessity for further applications arise, they may be addressed to the Court.

With respect to the documents that are to be furnished to the Court for inspection *in camera*, further rulings will be announced as soon as that process has been accomplished.

It is So Ordered.

Dated: New York, New York  
January 4, 1977

/s/ CHARLES S. HAIGHT, JR.  
CHARLES S. HAIGHT, JR.  
U.S.D.J.

## APPENDIX C

## Memorandum Opinion and Order

## UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

74 Civ. 434-CSH

ANTHONY HERBERT,

*Plaintiff,*

—against—

BARRY LANDO, MIKE WALLACE, COLUMBIA BROADCASTING  
SYSTEM, INC., ATLANTIC MONTHLY COMPANY,*Defendants.*HAIGHT, *District Judge:*

On January 4, 1977, this Court issued its Memorandum and Order determining certain questions that had arisen with respect to the proper scope of plaintiff's pre-trial discovery. Defendants Lando, Wallace and CBS now move this Court for certification of an interlocutory appeal, pursuant to 28 U.S.C. §1292(b).<sup>1</sup>

<sup>1</sup> "When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order."

*Appendix C—Memorandum Opinion and Order*

Plaintiff opposes certification. Defendant Atlantic Monthly Company takes no position on the question, because the issues sought to be raised by its co-defendants on the potential appeal do not involve Atlantic Monthly.

For the reasons appearing below, I grant the requested certification, and amend the Order of January 4, 1977 accordingly.

## I.

This Court's Memorandum and Order of January 4, 1977 set forth in detail the nature of the case, and the issues presented and resolved. For the sake of the following discussion, familiarity with that prior opinion is assumed.

In essence, this Court's prior Memorandum and Order granted to Lieutenant Colonel Herbert, a "public figure" plaintiff in a defamation action, the right to conduct pre-trial discovery, by means of oral depositions and discovery of documents, in areas which defendants Lando, Wallace and CBS strenuously contend are sacrosanct. Specifically, these defendants contend that such a plaintiff is not entitled to discovery in the area of what defendants refer to as their exercise of "editorial judgment".

As this Court observed in its original opinion, the proper breadth and scope of such a plaintiff's pre-trial discovery is a question of first impression, which must be determined within the context of considerations that arise out of *New York Times v. Sullivan*, 376 U.S. 254 (1964) and its progeny. Those considerations include: the scope of protection given by the First Amendment to publishers or other media who direct their attentions to "public figures"; the bases upon which such figures may hold publishers and media liable for defamation, notwithstanding that First Amendment protection; and the proper function of pre-trial discovery procedures, having in mind the plaintiff's bases of liability, the burden of proof he bears, and the

Appendix C—Memorandum Opinion and Order

defendant's First Amendment rights. In preparing its original Memorandum, the Court could find no case, and counsel cited no case, which considered the proper use of the full arsenal of pre-trial discovery weapons within this particular context. It was for that reason that the Court characterized the basic issue decided as one of first impression.

II.

Plaintiff, resisting certification, contends that piecemeal appeals are disfavored in general, and that they are inappropriate to discovery orders in particular. There is substantial force to these contentions; however, interlocutory appeals on questions relating to discovery are by no means unknown. Thus, pre-trial discovery orders have been reviewed by writs of mandamus, *Schlagenhauf v. Holder*, 379 U.S. 104 (1964) (question involving validity and construction of Rule 35(a), F.R.Civ.P., providing for physical and mental examination of defendant in a negligence action), as well as by certification under 28 U.S.C. §1292(b), *Carey v. Hume*, 492 F.2d 631 (D.C.Cir. 1974), cert. dismissed, 417 U.S. 938 (1974) (order under Rule 37(a), F.R.Civ.P., compelling defendant newspaper reporter, in libel action, to disclose identity of eyewitness sources).

These cases teach us that, whereas interlocutory appeals from discovery orders may be rare, circumstances can arise which render them appropriate. Thus in *American Express Warehousing, Ltd. v. Transamerica Insurance Co.*, 380 F.2d 277, 282 (2d Cir. 1967), the Second Circuit stated generally:

"When a discovery question is of extraordinary significance or there is extreme need for reversal of the district court's mandate before the case goes to judgment, there are escape hatches from the finality rule:

Appendix C—Memorandum Opinion and Order

a certification by the district court under 28 U.S.C. §1292(b), apparently not sought here, or an extraordinary writ."

The *American Express Warehousing* case denied a writ of mandamus in respect of the district court's order directing the production of certain documents for discovery. Judge Feinberg's majority opinion, after reviewing the touchstones for mandamus review specified by the Supreme Court in *Schlagenhauf*, supra, denied mandamus because the district court had the power under the discovery rules to order production of the documents in question; there was no abuse of discretion in the order; and the district court's holdings:

"... involve application of well-known law to commonplace fact, and rested on the district judge's appraisal of facts and exercise of discretion." 380 F.2d at p. 283.

In view of this latter consideration, Judge Feinberg concluded that an issue of first impression was not presented, as had been the case in *Schlagenhauf*.

In the case at bar, defendants seek to avail themselves of the alternative "escape hatch from the finality rule": certification under §1292(b). The statute sets forth its own touchstones. Certification is appropriate only if the district judge concludes that his opinion: (1) "involves a controlling question of law", (2) as to which there is "substantial ground for difference of opinion"; and that (3) "an immediate appeal from the order may materially advance the ultimate termination of the litigation."

In response to defendants' present motion, I must consider whether these three elements are present in the case at bar.

## Appendix C—Memorandum Opinion and Order

## III.

## “A Controlling Question of Law”

I have concluded that the validity or non-validity of defendants' contention that the concept of “editorial judgment” acts as a bar to discovery is of sufficient magnitude, both practical and theoretical, to rise to the level of “a controlling question of law.”

As pointed out in this Court's prior opinion, and particularly at page 9, the Supreme Court has repeatedly held that a “public figure” plaintiff may recover in a defamation suit if he can establish that false statements were made in “reckless disregard for truth”. The thrust of this Court's prior opinion is that, if “reckless disregard for truth” is a basis for liability, it necessarily follows that a plaintiff is entitled to discovery of the selective aspects of the editorial process; otherwise, he would never be able to prove (a) whether there had been “disregard” of available and accurate source material, and (b) whether such “disregard” could properly be characterized as “reckless”. I believe my prior order to have been correct, and the discovery mandated thereby to be appropriate. If it is not, however, the practical consequences upon the plaintiff, in respect of preparing his case for trial and sustaining a heavy burden of proof, would appear to be so substantial as to approach an issue of controlling significance. Compare *Garner v. Wolfenbarger*, 430 F.2d 1093, 1097 (5th Cir. 1970) (certification under §1292(b) granted with respect to district court's order denying availability of attorney-client privilege in suit by stockholders against corporation: “Review under §1292(b) is available where decision on an issue would affect the scope of the evidence in a complex case, even short of requiring complete dismissal”); *Time, Inc. v. McLaney*, 406 F.2d 565, 566 (5th Cir. 1969) (§1292(b) certification granted following denial of motion for sum-

## Appendix C—Memorandum Opinion and Order

mary judgment in libel suit; the Fifth Circuit, while recognizing the limited availability of interlocutory appeals, observed that: “The subject matter of this litigation, involving, as it does the very serious and timely question of how far the First Amendment guarantee of freedom of the press may still be impinged upon by actions for libel, places some cases in a somewhat different category.”)

Certification in the case at bar also seems indicated by the Second Circuit's discussion in *Investment Properties International Ltd. v. IOS, Ltd.*, 459 F.2d 705 (2d Cir. 1972), granting mandamus in respect of the district court's vacating of plaintiff's notices of deposition. The court stated:

“Judge Bonsal clearly had the power to vacate plaintiffs-petitioners' notices of deposition. Fed.R.Civ.P. 26(c)(1). Nevertheless, the issue here is one of first impression, and the vacation reveals, through its consequences, an abuse of discretion. *Discovery here, furthermore, is not a matter of mere 'housekeeping,'* see *American Express Warehousing, Ltd. v. Trans-America Insurance Co.*, supra, 380 F.2d at 284, *but is the heart of the controversy*, for on it turns plaintiffs-petitioners' right to be in court. The order below makes it virtually impossible to discover the facts on which jurisdiction and standing turn, and thus puts the plaintiffs-petitioners in a cul-de-sac which the Federal Rules never contemplated.” 459 F.2d at p. 707 (emphasis added).

While I recognize that *Investment Properties* arose out of a petition for mandamus, rather than certification under §1292(b), the practical considerations reflected in the language just quoted from Judge Oakes' opinion seem equally pertinent here.

*Appendix C—Memorandum Opinion and Order*

It has been recognized that, in the light of the *Schlagenhauf* case, circumstances may arise where a precise question of law needs to be "decided by an advance supervisory ruling", Gurfein, Ct. J., concurring in *Kaufman v. Edelstein*, 539 F.2d 811, 823 (2d Cir. 1976). I have concluded that this is such a case.

*"As to Which There is Substantial Ground for Difference of Opinion"*

I conclude that this second element is present, primarily because, as noted above, this is a question of first impression. That is a factor stressed by the *Schlagenhauf* case, within the mandamus context, and cases which have followed it. That particular factor seems equally pertinent within the context of §1292(b).

Quite obviously, the fact that a district judge has carefully considered a question and arrived at a decision does not automatically bar his subsequent certification that there is "substantial ground for difference of opinion." Presumably district judges always do what they think is right; but they are bound to consider whether substantial grounds for "difference of opinion" exist, and, where the decision is one of first impression, so that the judge is sailing (or believes himself to be) as a first voyager through undiscovered and uncharted seas, he should be inclined to find that the second element is satisfied. It is quite a different matter if the district court's order is just another implementation of an established line of authority.

*"An Immediate Appeal from the Order May Materially Advance the Ultimate Termination of the Litigation"*

While I am mindful of Judge Lombard's observation, dissenting in *American Express Warehousing, Ltd. v. Transamerica Insurance Co.*,<sup>2</sup> *supra*, at 380 F.2d 285 n.2, that "an order granting or denying discovery could rarely,

*Appendix C—Memorandum Opinion and Order*

if ever, satisfy this requirement", I have concluded that an interlocutory appeal from the prior order may indeed "materially advance the ultimate termination of the litigation."

As noted above, I believe my prior order respecting discovery to be correct. I must recognize, however, that its implementation will subject the defendants to considerable additional discovery, into areas from which they have thus far rigidly excluded the plaintiff. Assuming *arguendo* that my original order was in error, then there is no reason why the defendants should be subjected to additional, time-consuming, and expensive discovery proceedings.<sup>2</sup>

Furthermore, an appellate ruling, at this time, with respect to the central and significant issues posed by the prior order may well serve as instructive and time-saving guidelines at the trial of the case.

In short, I perceive in this case an appropriate opportunity for "an advance supervisory ruling" in Judge Gurfein's phrase in *Kaufman v. Edelstein*, *supra*.

The foregoing discussion is offered with deference, and in recognition that, despite my own conclusions, the Court of Appeals may determine that the appeal should not be permitted. I have attempted to set forth my reasons at some length for whatever assistance they may prove to be.

<sup>2</sup> Plaintiff also opposes certification on the ground that, far from advancing the litigation, an interlocutory appeal will delay completion of his discovery. Assuming that the Court of Appeals either denies certification, or grants it and affirms this Court's order, it is of course true that plaintiff's discovery proceedings will have been delayed. I see no reason, however, why plaintiff cannot go forward at this time with uncompleted discovery not related to these issues; or why defendants cannot commence their discovery of plaintiff. I gather from the papers submitted to me that the parties agreed to defer discovery of plaintiff until plaintiff had completed his oral discovery of defendants. Whatever considerations underlay that agreement when made, no reason appears why, in the present circumstances, the oral discovery of plaintiff cannot now begin.

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ORDER

For the foregoing reasons, it is hereby:

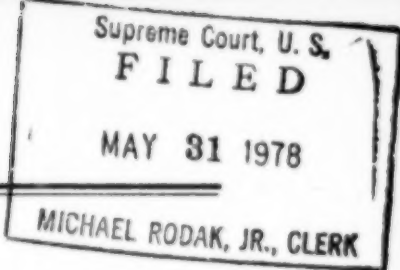
ORDERED, that this Court's prior Memorandum and Order of January 4, 1977 be, and the same hereby is, amended so as to provide that, in the opinion of this Court, such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.

It is So Ordered.

Dated: New York, New York  
February 22, 1977

/s/ CHARLES S. HAIGHT, JR.  
CHARLES S. HAIGHT, JR.  
U.S.D.J.

APPENDIX



IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1105

ANTHONY HERBERT,

*Petitioner,*

*against*

BARRY LANDO, MIKE WALLACE, COLUMBIA  
BROADCASTING SYSTEM, INC., ATLANTIC  
MONTHLY COMPANY,

*Defendants,*

BARRY LANDO, MIKE WALLACE and CBS INC.,  
*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SECOND CIRCUIT.

Petition for Certiorari Filed February 6, 1978.  
Certiorari Granted March 20, 1978.

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## Supreme Court of the United States

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ANTHONY HERBERT

vs.

BARRY LANDO, MIKE WALLACE, COLUMBIA BROADCASTING SYSTEM, Inc., ATLANTIC MONTHLY COMPANY.

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### Relevant Docket Entries

#### Attorneys for plaintiff:

Cohn, Glickstein, Lurie, Ostrin & Lubell, 1370 Avenue of the Americas, N.Y.C. 10019, 757-4000.

#### Attorneys for defendant:

Coudert Brothers, Pan American Bldg.—200 Park Ave—NYC 10017 (973-3300) (for defts. Mike Wallace and CBS).

Rembar Wolf & Curtis, 19 West 44th St—NYC 10036 (575-8500) (for deft. Atlantic Monthly Co.).

Green & Hillman, 1270 Ave. of the Americas—NYC 10020 (246-8689) (for deft. Barry Lando).

Date

Proceedings

1974

Jan. 25 Filed Complaint. Issued Summons.

Jan. 25 Filed order that Edith Williams is appointed to serve the summons and complaint on the defts. Mike Wallace, Columbia Broadcasting System, Inc. and Atlantic Monthly Company and that Luther C. West is appointed to serve the summons and complaint on the deft. Barry Lando. Clerk

## Relevant Docket Entries

Date	Proceedings
Jan. 25	Filed order that Gabriel Kantrovitz is appointed to serve summons and complaint on the deft. Atlantic Monthly Company. Clerk
Feb. 1	Filed affdvt. of service of Edith Williams of summons and complaint to deft. Atlantic Monthly Co.
Feb. 1	Filed affdvt. of service of Edith Williams of summons and complaint to deft. Mike Wallace.
Feb. 1	Filed affdvt. of service of Edith Williams of summons and complaint to deft. Columbia Broadcasting System, Inc.
Feb. 4	Filed summons with return: SERVED: Affidavit of Luther C. West dated Jan 31, 1971
Feb. 15	Filed Order extending defts' time to answer to 3-15-74. FRANKEL, J. (m/n)
Feb. 15	Filed defts. Columbia Broadcasting System, Inc.'s and Mike Wallace's <i>ex parte</i> motion to enlarge time.
Feb. 19	Filed stip & order extending deft. Atlantic Monthly Co.'s time to answer to 3-15-74.
Feb. 19	Filed memo endorsed on motion filed 2-15-74. Motion granted. So ordered—FRANKEL, J. (m/n)
Feb. 19	Filed summons upon Barry Lando by Clerk of the U.S.D.C. that an answer to said complaint be served upon Cohn Glickstein Lurie Ostrin & Lubell with attached affidavit of service by Luther C. West dated 2-12-74.
Feb. 25	Filed stip & order extending deft. Barry Lando's time to answer to 3-15-74. So ordered—FRANKEL, J.

## Relevant Docket Entries

Date	Proceedings
Mar. 18	Filed defts'. Barry Lando, Mike Wallace and Columbia Broadcasting System, Inc's affdvt. of Barry Lando and notice of motion for an order severing counts 1 and 11 of complaint. Ret. 3-25-74
Mar. 18	Filed defts' Barry Lando, Mike Wallace and Columbia Broadcasting System, Inc's memorandum of law in support of their motion to sever; and in the alternative to compel separate trials of Counts 1 and 11 of plttf's complaint.
Mar. 18	Filed ANSWER of defts. Mike Wallace and Columbia Broadcasting System, Inc.
Mar. 18	Filed ANSWER of deft. Barry Lando
Mar. 19	Filed ANSWER of deft. Atlantic Monthly Co.
Mar. 25	Filed deft. Atlantic Monthly Co's memorandum in opposition to motion by defts. Lando, Wallace and CBS insofar as it seeks a severance of counts 1 and 11 of the complaint and in support of their motion as it seeks, in the alternative, separate trials of counts 1 and 11.
Apr. 2	Filed amended ANSWER of deft. Barry Lando
Apr. 4	Filed defts. Barry Lando, Mike Wallace and CBS, INC. memorandum of law in further support of their motion to sever; and in the alternative to compel separate trials of counts 1 and 11 of plttf's complaint.
Apr. 5	Filed plttf's memorandum in opposition to motion of defts. Lando, Wallace, CBS, INC. to sever or for separate trials.
Apr. 5	Filed deft. Atlantic Monthly Co's further memorandum in support of the motion for separate trials.

## Relevant Docket Entries

Date	Proceedings
May 9	Filed memo endorsed on motion filed 3-18-74. Motion denied. So ordered—FRANKEL, J. (m/n)
May 15	Filed plttf's first request for production of documents.
May 15	Filed plttf's notice to take deposition of deft. Barry Lando on 6-19-74
May 16	Filed plttf's notice of taking deposition of deft. Mike Wallace on 6-25-74
May 20	Filed plttfs Notice to take deposition and first request of plttf for production of documents.
June 26	Filed deft. Atlantic Monthly Co's answer to first request for production of documents.
June 26	Filed deft. Atlantic Monthly Co's first request for production of documents.
July 5	Filed stip & order extending deft. Atlantic Monthly Co's time to respond to first request for production of documents to 6-21-74 and the time for all other defts. to respond to the first request for production of documents is extended to 7-11-74 and as indicated. So ordered—FRANKEL, J.
July 12	Filed defts. Mike Wallace and Columbia Broadcasting System, Inc's answer to first request for production of documents.
1975	
Aug. 1	Filed plttf's notice of taking deposition of the U.S. Dept. of Army, Office of Information, on 8-18-75
Aug. 6	Filed Affdvt. of service of subpoena <i>duces tecum</i> by an individual—served: U.S. Dept. of the Army, Office of Information by Col. Leo T. McMahon, Jr. on 8-4-75

## Relevant Docket Entries

Date	Proceedings
1976	
Jan. 8	Filed notice of change of firm name of defts atty, to Green & Hillman.
Feb. 23	Filed plttfs second request for production of documents.
Mar. 24	Filed plttfs answer to Atlantic Monthly Co's first request for production of documents.
Apr. 5	Filed defts (Lando's) answer to second request of plttf for production of documents.
Apr. 5	Filed deft (Lando's) answer to first request of plttf for production of documents.
1977	
Apr. 26	Mailed notice of reassignment to Judge Haight
1976	
Apr. 23	Filed Defts'. (Mike Wallace & CBS) first request for production of documents.
May 12	Filed Deft's. (Barry Lando) first request for production of documents.
May 13	Filed Deft's. (Barry Lando) notice of designation of Richard G. Green as trial counsel.
May 17	Filed Defts'. (Mike Wallace & CBS, Inc.) notice of designation of Carleton D. Eldridge, Jr. as trial counsel.
May 17	Filed Plttf's. notice of designation of Jonathan W. Lubell and Mary K. O'Melveny as trial counsel.
May 18	Filed Deft's. (Atlantic Monthly Co.) notice of designation of Charles Rembar as trial counsel.

*Relevant Docket Entries*

Date	Proceedings
May 24	Filed Defts'. (Mike Wallace & CBS) answers to questions by the court.
May 24	Filed Deft's. (Lando) answers to questions by the court.
May 25	Filed Pltff's. answers to questionnaire for initial pre-trial conference.
May 26	PRE-TRIAL CONFERENCE HELD BY Haight, J.—Rule 37 motion to be made. Motion for summary judgment to be submitted & discovery to be completed by 1-1-77.
June 2	Filed Pre-Trial Order that discovery shall be completed by 10-29-76 and that Defts'. summary judgment motions shall be submitted by 12-31-76 ..... Haight, J. (mailed notice)
June 10	Filed Pltff's. response to Defts'. (Wallace & CBS) first request for production of documents.
June 10	Filed Pltff's. response to Deft's. (Lando) first request for production of documents.
July 21	Hearing begun and concluded July 21, 1976 on the matters of discovery. (before CSH)
Aug. 31	Filed transcript of record of proceedings dated 7-21-76.
Sept. 23	Filed Pltff's affidavit in support of motion to compel discovery.
Sept. 23	Filed Deft's. (Atlantic) affidavit in opposition to Pltff's. request for additional discovery.
Sept. 23	Filed Deft's. (Atlantic) memorandum in opposition to Pltff's. requests for further discovery.
Sept. 23	Filed Defts'. (Lando, Wallace & CBS) memorandum of law in opposition to Pltff's. Rule 37 application.

*Relevant Docket Entries*

Date	Proceedings
Sept. 23	Filed Pltff's. memorandum of law in support of motion to compel discovery.
Oct. 29	Filed pltffs reply brief.
Oct. 29	Filed pltff affidavit in support of motion to compel discovery.
Oct. 29	Filed deft reply memo in opposition to motion.
Nov. 1	Filed Deft reply memo in opposition to pltff's request for further discovery.
Nov. 1	Filed defts affidavit in opposition to pltff's request for discovery.
1977	
Jan. 4	Filed Opinion #45494 ..... Defts are ordered to comply with memo opinion of the Judge. All documents demanded by pltff that are not covered by client-attorney privilege are to be produced for in camera inspection of J. Haight.—So ordered Haight J. m/n
Jan. 5	Filed defts' reply memo in opposition to pltffs request for further discovery.
Feb. 24	Filed memo opinion and order ..... #45629 ..... I grant the requested certification and amend the order of 1-4-77 accordingly ..... so as to provide that in opinion of the Court such order involves a contr. question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation So ordered Haight, J. m/n
Mar. 25	Filed bond for undertaking of costs on appeal in amt. of \$250.00 (Fireman's Fund)
Apr. 15	Filed notice of termination of record on appeal to USCA

## Complaint

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

---

 ANTHONY HERBERT,
*Plaintiff,**against*BARRY LANDO, MIKE WALLACE, COLUMBIA BROADCASTING  
SYSTEM, Inc., ATLANTIC MONTHLY COMPANY,*Defendants.*Civil Action No.  

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## PLAINTIFF DEMANDS A TRIAL BY JURY

Plaintiff, by COHN, GLICKSTEIN, LURIE, OSTRIN & LUBELL, his attorneys, as and for his complaint against the defendants, alleges as follows:

## JURISDICTION AND PARTIES

1. This Court has jurisdiction of the within action under the provisions of 28 U.S.C. 1333(a). The matter in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand (\$10,000.00) Dollars.

2. Plaintiff ANTHONY HERBERT (hereinafter "Herbert"), a citizen of the State of Georgia, is a retired United States Army Officer who, prior to his retirement, brought certain charges against his immediate superior officers relative to the cover-up of atrocities during the Vietnam War and subsequent to his retirement caused to be written a book entitled "SOLDIER", which discussed his military career and the events surrounding his charges against said officers.

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3. Defendant BARRY LANDO (hereinafter "Lando") is, upon information and belief, a citizen of the State of Maryland and at all times hereinafter mentioned is and was an employee of defendant COLUMBIA BROADCASTING SYSTEMS, INC. in which capacity he produced a program entitled "THE SELLING OF ANTHONY HERBERT" (hereinafter "Selling") which was broadcast on CBS Television Network from its studio in New York City on February 4, 1973 and who, subsequent thereto, wrote and caused to be published in the May, 1973 issue of "THE ATLANTIC MONTHLY" magazine published by the defendant ATLANTIC MONTHLY COMPANY an article entitled "THE HERBERT AFFAIR" (hereinafter "Affair").

4. Defendant MIKE WALLACE is, upon information and belief, a citizen of the State of New York, and is and at all times hereinafter mentioned was a reporter employed by the defendant COLUMBIA BROADCASTING SYSTEMS, INC. in which capacity he serves as one of the correspondents of the documentary series known as "60 minutes" and who, as part of that series served as the narrator of and one of the interviewers on "Selling".

5. Upon information and belief, Defendant COLUMBIA BROADCASTING SYSTEM, INC. (hereinafter "CBS") is and at all times hereinafter mentioned was a corporation incorporated under the laws of the State of New York, having its principal place of business in the State of New York and engaging in the business of, among other things, the production, distribution, sale and broadcasting of television programs through one of its divisions, CBS Television Network.

6. Upon information and belief, defendant ATLANTIC MONTHLY COMPANY (hereinafter "Company") is and at all times hereinafter mentioned was a corporation incorporated in the Commonwealth of Massachusetts and

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engaging in, among other things, the publication, distribution and sale of a magazine known as "THE ATLANTIC MONTHLY" (hereinafter "Monthly") in the State of New York and elsewhere.

FIRST COUNT AGAINST DEFENDANTS BARRY LANDO, MIKE WALLACE AND COLUMBIA BROADCASTING SYSTEM, INC.

7. As a young man of 17, plaintiff enlisted in the United States Army. In the ensuing 24 years of military service he steadily rose in the ranks and was regarded with the highest professional esteem by his fellow soldiers and officers. Plaintiff was repeatedly cited by the Army as the most decorated soldier in the Korean War and in November of 1951, General Matthew B. Ridgeway selected him as the outstanding American soldier in Korea. Plaintiff toured the United States and foreign countries representing the United States Army. Plaintiff's reputation for courage under fire and personal integrity was beyond dispute. In the view of the citizens of plaintiff's country he was a genuine American hero.

8. While Commander of the 2d Battalion, 503d Infantry, 173d Airborne Brigade in Vietnam, plaintiff reported to his superior officers atrocities committed and permitted by United States forces in violation of international law and military regulations. Plaintiff persisted in these reports, criticizing to his superior officers the acts of atrocities which were widely known in the Brigade. Notwithstanding recognition of plaintiff as an outstanding Battalion Commander, he was relieved of command by his superior Brigade officers. A poor efficiency rating was even placed against his record which was subsequently expunged by the Secretary of the Army upon review.

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9. Immediately following his relief from command, plaintiff attempted to process charges in Vietnam against the Brigade officers—General John W. Barnes (hereafter "Barnes") and Colonel Joseph Ross Franklin (hereafter "Franklin")—for failing to act upon plaintiff's earlier reports and complaints and for covering up the charged atrocities.

10. Upon his return to the United States in 1969, plaintiff continued to pursue, first at Fort Leavenworth and then at Fort McPherson, his charges of war crimes committed in Vietnam during his tour there and the command coverup and complicity. In September of 1970, plaintiff's charges were made to the Third Army Inspector General at Fort McPherson and subsequently referred to the U.S. Army Criminal Investigation Division Agency (USACIDA) and in March of 1971, plaintiff filed formal charges against General Barnes and Colonel Franklin.

11. In or about March of 1971, it became known beyond the military and Department of Defense that plaintiff was charging war crimes and command coverup thereof. Plaintiff's charges and his past difficulties in having the charges filed, investigated or acted upon immediately became a matter of wide public interest.

12. In or about June of 1971, defendant Lando first met plaintiff at Natural Bridge, Virginia. He brought with him an agreement to work on an "as told to" book about plaintiff's military experiences which he asked plaintiff to sign. Plaintiff refused to do so, stating that he believed it was against Army regulations. Lando continued to pursue the matter and approximately two weeks later defendant Lando flew to plaintiff's home where he once again sought to have plaintiff sign such an agreement. Defendant attempted again in March, 1972, immediately following plaintiff's retirement, to have plaintiff sign the agreement. Plaintiff refused again.

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13. Upon information and belief, commencing at a time which is presently unknown to plaintiff, defendant Lando undertook to create the false picture of plaintiff as a liar who never reported the war crimes he charged, as a perpetrator of atrocities and brutalities himself and as an opportunist who was trying to use an issue of current concern to explain his own alleged failures in the Army. Defendant Lando sought to promulgate this false view of plaintiff through the mass media including the 60 Minutes documentary show, of which he was a producer, and various magazine articles which he would write or cause to be written; notwithstanding the fact that defendant Lando knew that such a portrayal of plaintiff was false. Defendant Lando undertook the said course of conduct maliciously, with the intent to damage plaintiff and, in order to accomplish such objective, used the facilities and influence of the Department of Defense and the Department of the Army. Defendant Lando used and/or worked with other law-enforcement agencies and intelligence agencies to construct the false and defamatory picture of plaintiff to be promulgated through the mass media.

14. Upon information and belief, defendant Wallace participated in the production and presentation and encouraged the publication of "Selling" when he knew that the publication and presentation thereof was false and distorted as herein alleged; that without any basis or investigation defendant Wallace had stated some time prior to "Selling" that plaintiff was a liar whose story should be discredited and defendant sought to carry out this predesign and purpose by his participation in the production of "Selling" while intentionally creating the false impression of a balanced and objective presentation.

15. Upon information and belief, at all times herein alleged and, in particular at the time of the production, presentation and broadcast of "Selling" defendants Lando

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and Wallace were employees of defendant CBS and their activities and conduct herein alleged were done within the scope of said employment; that said activities and conduct were known to and ratified by certain CBS officials and executive personnel.

16. The television program "Selling", produced by defendant Lando, was broadcast by defendant CBS on February 4, 1973 to millions of viewers; from beginning to end and as a whole it was written, edited and produced to impugn plaintiff's reputation as a hero and an honest man disillusioned with the conduct of the government and the Army he had served with pride, and to falsely and maliciously paint him as a liar, an opportunist and the perpetrator of a hoax upon the public.

17. Under defendant Lando's supervision and direction, with the participation of defendants CBS and Wallace, "Selling" was written, edited and presented to the public under the false guise of "objective reporting" so as to more effectively damage plaintiff's reputation, undermine his charges and remove him as a highly respected critic of the conduct of the military establishment.

18. The transcript of "Selling" as published on national television is annexed hereto as Exhibit "A", made a part hereof and incorporated herein as though fully set forth herein. Defendants composed and caused to publish and did publish said false, malicious and defamatory transcript (Exhibit A) of and concerning plaintiff and by such composition and publication, as well as the presentation and broadcast thereof as herein alleged, defendants meant and intended to convey and did convey the following false and defamatory meanings of and concerning plaintiff:

(a) That plaintiff was not a hero but a cold blooded killer and this was the view of his Commanders and those who served under him.

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(b) That plaintiff's charges of atrocities, command complicity and cover-up had never been raised until the headlines were filled with news of the My Lai massacres and that plaintiff improperly sought to capitalize on such headlines.

(c) That plaintiff's charges of atrocities, command complicity and cover-up were made out of vindictive motives in response to his relief from command.

(d) That no proof existed to support the plaintiff's charge that he had reported an incident described as the "St. Valentine's Day Massacre" (hereafter "Massacre") to Franklin, his immediate superior, and that plaintiff had lied regarding that event.

(e) That "scores of people" were interviewed about plaintiff's charges, none of whom could support plaintiff, and that plaintiff was therefore a liar.

(f) That plaintiff himself had observed but failed to act on incidents of torture or other atrocities and that plaintiff was therefore a liar.

(g) That "scores of people" were interviewed about plaintiff's book "SOLDIER", all of whom questioned its and plaintiff's veracity and accuracy and that plaintiff had therefore lied in said book.

(h) That no pressure to discredit plaintiff was exerted upon members of the military interviewed for "Selling" and that their statements, therefore, showed plaintiff to be a liar.

(i) That investigations of plaintiff's commanding officers Barnes and Franklin were thoroughly conducted by the military and were not whitewashed in any fashion and that plaintiff's charges against these officers had been proven false.

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(j) That no proof existed to support plaintiff's charges of atrocities, command complicity and coverup, and that plaintiff therefore had lied on these matters.

(k) That plaintiff himself had participated in acts of brutality.

19. Upon information and belief, defendant Lando's research, interviews and investigation, and that of persons working with him or under his supervision disclosed specific support for and proof of plaintiff's charges of atrocities, command complicity and cover-up as described and discussed by plaintiff prior to the broadcasting of "Selling", and that such support and proof was known to defendants Wallace and CBS.

20. Upon information and belief, defendant Lando enlisted and received the aid, support and assistance of U.S. Army personnel to discredit plaintiff and undermine his story and impact upon the American public. With such assistance defendant Lando elicited equivocal statements from persons still in the Army regarding plaintiff by intimidating them and threatening their military careers. Such assistance and intimidation were known to and countenanced by defendants Wallace and CBS.

21. Upon information and belief, defendant Lando approached various persons to be interviewed with uncorrected galley proofs of isolated segments of plaintiff's book "SOLDIER" or read to them such alleged segments to elicit disagreement or concern with such segments, knowing such persons had not read plaintiff's book in its entirety. Statements and comments made by such persons in response to this technique were thereafter related and represented by defendants on "Selling" to be an indictment of plaintiff's book in its entirety, despite the fact that the full context had not been shown to them. Upon information and belief, had such persons been aware of the full passages or accurate contents of "SOLDIER", they

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would have made different statements or expressed different reactions. Such conduct was known to and countenanced by defendants Wallace and CBS.

22. Upon information and belief, defendant Lando, taped or caused to be taped film interviews with witnesses and others which were not presented fully on "Selling" but were edited and taken out of the context of the interview so as to support defendants' malicious intentions to discredit plaintiff. Had such interviews been presented in full, or had segments thereof been presented in their proper context, plaintiff would not have been falsely and maliciously portrayed in the manner set forth in paragraph 18 above. Such editorial distortions were known to and countenanced by defendants Wallace and CBS.

23. Upon information and belief, defendant Lando interviewed or caused to be interviewed witnesses who were favorable to and supportive of plaintiff's charges and declined and deliberately failed to include said interviews on "Selling" or to reveal their existence to the television audience. Such intentional omissions of positive information were known to and countenanced by defendants Wallace and CBS.

24. Upon information and belief, defendant Lando conducted or caused to be conducted an interview with Captain Richard Heintz, plaintiff's military lawyer, which supported plaintiff's charges of atrocities, command complicity and cover-up and of the whitewashed investigation of plaintiff's charges against Barnes and Franklin. Defendant Lando failed to include portions of said interview on "Selling" and instead permitted a summary of the interview with Captain Heintz to be presented in a manner which did not reflect its true content, leaving the false impression that Captain Heintz was also uncertain about plaintiff's veracity. Such omissions and actions were known to and countenanced by defendants Wallace and CBS.

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25. Upon information and belief, "Selling" was presented for approximately 30 minutes of air time and was edited, written and produced in such a manner as to appear to be a contemporaneous and/or continuous interview between plaintiff and defendant Wallace when in fact defendant Lando and defendant Wallace and others interviewed plaintiff in New York for approximately two hours and without the presence of any other persons who appeared on "Selling" except for one brief period lasting approximately 10 minutes with Major James Grimshaw. Defendant CBS was aware of such production, editing and conduct of defendants Lando and Wallace.

26. Upon information and belief, defendants conducted and/or caused to be conducted said interview with plaintiff under conditions which constituted a vast departure from those normally existing for other guests and subjects of "60 minutes" and of other interview, documentary or news programs of defendant CBS or its division CBS News, or of any other network. These unusual and abnormal conditions were intended by defendants and those acting with them to cause plaintiff to appear on "Selling" as evasive, harassed, unresponsive to the interviewers' questions so as to damage his reputation and impugn his credibility with the American public. Some of these unusual conditions included the following:

(a) Plaintiff's interview was conducted and filmed in a small, stark room, painted entirely in white, without decoration, causing abnormal glare and giving plaintiff a haggard and uncomfortable demeanor.

(b) Excessive, high intensity lighting was placed in said room positioned so close to plaintiff's face and eyes as to cause him great discomfort, forcing plaintiff to squint and to be unable to look directly into the face of the interviewer. Such intense light caused plaintiff to appear evasive and not forthright and candid in manner.

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(c) At least ten or twelve uninformed guards employed by defendant CBS were present in or around said room, positioned at all times in a manner which created an atmosphere of intimidation, uncertainty and harassment.

(d) Defendant Lando, along with defendant Wallace and others used abusive, abrasive and antagonistic language during the course of said interview in an attempt to goad plaintiff to anger. Such language ridiculed and harassed plaintiff and persons attending said interview with him. Such unwarranted hostility and animosity was also expressed by hostile gestures, glances and facial expressions designed to further harass plaintiff and create an aura of uncertainty and defensiveness.

(e) Defendant Lando, at the conclusion of said interview, threatened plaintiff that he intended to "get" him and persons who had worked and were working with him, further adding to the intended atmosphere of harassment, intimidation and uncertainty.

(f) Officials and executive personnel employed by defendant CBS were present at said interview and made no attempt to stop such conduct by defendants Wallace and Lando but rather countenanced and encouraged same thereby causing plaintiff further distress and discomfiture.

27. Upon information and belief, said interview, if viewed in its entirety rather than in the edited and distorted form in which it was published on "Selling" (as set forth in Exhibit "A"), would show the following facts which were at all times known to defendants:

(a) The aforesaid adverse, highly unusual circumstances surrounding said interview including the abrasive and harassing behavior of defendants and others toward plaintiff.

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(b) That plaintiff's responses to questions aired on "Selling" were not, in fact, the responses given by plaintiff to such questions but were instead taken out of context, with relevant portions deleted or foreshortened, and that the questions to which such answers related were not the same as those which appeared on "Selling".

(c) That had plaintiff's actual responses to the questions aired on "Selling" been shown, they would not have created the impression of vagueness and evasiveness which the alleged answers shown created.

28. Upon information and belief, defendants caused and intended "Selling" as published to include facial expressions, grimaces and vocal emphases designed to cast doubt upon plaintiff's reputation and allegations and instill in the mind of the television audience that plaintiff was not truthfully regarded. Such gestures, tones of voice and related actions cannot be adequately determined from the written transcript of "Selling" annexed as Exhibit "A" and incorporated herein but were unique to the medium of visual presentation.

29. Upon information and belief, the taped, filmed or other interviews made or caused to be made by defendants Lando, CBS, Wallace and others for the production and presentation of "Selling" were conducted in comfortable settings, in direct contrast to the environment of plaintiff's interview as set forth in Paragraph 26 and, if seen or heard in their entirety, would show the following facts, directly in conflict with the false and malicious impressions created by "Selling" as set forth in Exhibit "A".

(a) That an interview of Major Grimshaw was conducted in Pentagon, with Army personnel in attendance.

(b) That the interview with Kenneth Rosenblum would reveal that he was an investigator assigned to the Military District of Washington, the same command in which Barnes

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was a superior officer, and not merely a disinterested investigator from the Judge Advocate General's Corps.

(c) That the interview with Sargeant Bruce Potter was excerpted on "Selling" to portray plaintiff as a war criminal when Sargeant Potter repeatedly stated that plaintiff did not and would not have condoned or committed war crimes.

(d) That the questions asked of Colonel John Douglas, Barnes and Franklin were specifically designed to elicit responses damaging to plaintiff and that it was made clear to Barnes and Franklin that the intention of "Selling" was to discredit plaintiff and thus to remove him as an effective critic of the military establishment.

(e) That defendants deliberately misrepresented plaintiff's remarks, writing, and statements to certain witnesses in order to goad them into anger at plaintiff so as to elicit the desired distorted responses to questions which cast plaintiff as a liar, an opportunist and a vindictive man.

(f) That defendants deliberately attempted to create the impression in the minds of persons being interviewed that plaintiff had made a fortune from the writing of his book, intending to breed suspicion and contempt for plaintiff so as to elicit distorted responses.

(g) That numerous persons interviewed supported plaintiff's charges, as well as his veracity and leadership, and specifically denied any suggestion that plaintiff was brutal or as a ruthless "killer".

(h) That numerous persons interviewed who were still in the military declined to respond favorably to plaintiff or at all because of fear of reprisals or other adverse influence upon their careers and that in some cases defendants, with the participation and assistance of the U.S. Army, used such fears to exploit and affect their responses.

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(i) That the summary of the interviews of Mike Plantz and Bob Stemmies presented on "Selling" were distorted and out of context.

(j) That the interviews of Captain Bill Hill would reveal that Hill supported plaintiff's version of reporting the "Massacre" to Franklin and of other charges made by plaintiff, that Hill was fearful of military repercussions for any favorable statements made about plaintiff, that Hill believed that Army regulations prevented him from detailing his knowledge of incidents reported and described by plaintiff, and further that the quote attributed to him on "Selling" was out of context and elicited by deceitful means by misrepresenting to Hill statements made by plaintiff which had not been made.

30. Upon information and belief, defendants Lando, Wallace and CBS selected the title to "Selling" so as not only to impugn the honesty and motives of plaintiff but also to placate the Pentagon after having previously received adverse and hostile reactions from the U.S. Military establishment to a documentary program entitled "The Selling of the Pentagon" which criticized said establishment.

31. The conduct of defendants Lando, Wallace and CBS, at all times herein, as set forth above, deliberately and maliciously defamed plaintiff, was accomplished by means which radically departed from usual and normal professional media and journalistic standards, and resulted in the national broadcast of "Selling" which created and presented false and distorted information and impressions known to defendants to be false and distorted but presented with reckless disregard of whether or not they were false and distorted.

32. The malicious activities of defendants with regard to the intentions and effect of "Selling" have continued to date, in that defendant CBS has attempted to forestall the

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instant litigation by directing its wholly-owned subsidiary Holt, Rinehart & Winston, publisher of "SOLDIER" not to make an early payment against plaintiff's earned royalties under his contract according to the standard usual custom and practice in the publishing trade, which would have been made but for the intervention of defendant CBS.

33. By reason of the aforesaid acts of defendants Lando, Wallace and CBS, the broadcast of "Selling" caused plaintiff to suffer the following special damages: (a) The appearance of "Selling" almost simultaneously with the publication of "SOLDIER" impaired said book as a literary property and caused sales to be below expectations; (b) the sale of the paperback rights of "SOLDIER" was for a sum substantially less than would have been received had "Selling" not been broadcast; (c) offers and discussions regarding sale of motion picture rights to "SOLDIER" which took place prior to the broadcast of "Selling" were discontinued after its broadcast and no movie rights have been sold; (d) offers and discussions regarding the sale of rights to a filmed lecture series to television, industry and educational institutions which took place prior to the broadcast of "Selling" were discontinued after its broadcast and such rights have not been sold; (e) plaintiff's paid speaking engagements and public appearances dropped sharply immediately after the broadcast of "Selling" and have continued to be far less than prior to such broadcast, all to his special damage in the sum of Two Million Five Hundred Thousand (\$2,500,000) Dollars.

34. By reason of the aforesaid acts of defendants, plaintiff has been grievously injured in his good name, character and reputation; plaintiff's reputation among the American public in general as a courageous and honest person dedicated to the welfare of his country has been seriously impaired; plaintiff's reputation, both to the general public and to his friends, acquaintances and former

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colleagues in the armed forces, as a professional soldier of high moral character has been destroyed; plaintiff's good name and character acquired over many years of dedicated service to his country has been deeply damaged, and plaintiff and his family have been held up to ridicule and contempt by friends, acquaintances, neighbors and the public in general, all to his general damage in the sum of Ten Million (\$10,000,000.00) Dollars.

## SECOND COUNT AGAINST DEFENDANTS BARRY LANDO AND ATLANTIC MONTHLY COMPANY

35. Plaintiff repeats and realleges each and every allegation contained in paragraphs of this Complaint numbered "1" through "3" inclusive, "6" through "13" inclusive and "16" through "31" inclusive, as though herein fully set forth at length.

36. The magazine "Monthly" published by defendant Company is sold throughout the country and, upon information and belief, has a circulation in excess of 375,000 copies.

37. The magazine article "Affair", written by defendant Lando, was distributed by defendant Company in the May, 1973 issue of "Monthly", Volume 231, Number 5; "Affair" was written and published to impugn plaintiff's reputation as a hero and an honest man disillusioned with the conduct of the government and the Army had had served with pride, and to falsely and maliciously paint him as a liar, an opportunist and the perpetrator of a hoax upon the public.

38. By reason of defendant's malicious intentions, the magazine article "Affair" repeated, continued and republished the false and defamatory information broadcast on "Selling" and, upon information and belief, defendant wrote said "Article" intending to accomplish such a result.

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39. "Affair" was written by defendant Lando and published by defendant Company under the false guise of "objective reporting" so as to effectively damage and continue the damage to plaintiff's reputation, undermine his charges and remove him as a highly respected critic of the conduct of the military establishment.

40. A copy of "Affair" as published in "Monthly" is annexed hereto as Exhibit "B", made a part hereof and incorporated herein as though fully set forth herein. Said "Affair" which defendant Lando composed and defendants caused to be published and did publish is false, malicious and defamatory of and concerning the plaintiff; by such writing and publication as a whole and by the specific passages alleged herein defendants meant and intended to convey and did convey the false and defamatory meanings of and concerning plaintiff alleged herein.

41. "Affair" conveyed the false, defamatory and malicious impression that plaintiff was a brutal and vicious man who had himself committed acts of atrocities and war crimes, by reason of the following specific passages therein, as well as in its entirety:

- (a) "Reporters who inquired about the case had interviews arranged for them with several officers who had known Herbert in the 173rd and disputed his charges. Many leveled accusations against Herbert, claiming he himself had treated enemy POW's brutally, had damaged at least one civilian hamlet, and had exaggerated or otherwise misrepresented body counts."

Upon information and belief, defendant Lando maliciously omits the fact, known to him when "Affair" was written and published, that the Secretary of the Army formally exonerated plaintiff from all such charges; that every company officer in plaintiff's Battalion had sworn under oath that body counts reported by plaintiff were

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accurate; and that the interviews mentioned were arranged by officials of the Army with persons known to be unfavorable to plaintiff or fearful of reprisals by the Army for making favorable statements about plaintiff.

- (b) "Many other officers, who might have effectively challenged several of Herbert's charges, kept silent, either because they had respected him in Vietnam, or because they just did not want to tangle with him."

The impression that plaintiff was a man to be feared, thereby causing persons interviewed to be afraid to tell the truth, is false.

- (c) "It was only after Herbert had been transferred to Fort McPherson, Georgia, where the My Lai trials were in full swing, that there is any solid indication he was thinking about reporting war crimes. And it may well be that in bringing those charges, Herbert was as concerned with covering himself as with attacking Franklin and Barnes".

The suggestion that plaintiff had committed war crimes himself and wanted to cover up his own conduct is false and defamatory.

- (d) "Master Sergeant Roy Baumgarner, who served under Herbert, was charged with having murdered three Vietnamese peasants in cold blood, blown off their heads with a grenade, then produced several Chinese weapons which he claimed he found on their bodies to substantiate his story that they were enemy soldiers. Herbert ridicules the charges, and depicts himself defending a hapless Baumgarner's constitutional rights against badgering military investigators.

Herbert ends his account without mentioning that Baumgarner was ultimately court-martialed and found guilty on the basis of overwhelming evidence."

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Upon information and belief, defendant Lando knew that Army records reveal that plaintiff himself brought these very charges against Baumgarner and appeared at the court martial (when Franklin and Barnes failed to do so), and defendant Lando further knew that the sentence was changed and reduced by the Army to a nominal fine and Baumgarner returned to Vietnam. Thus the impression that plaintiff condoned war crimes and brutality is false and defamatory.

42. "Affair" conveyed the false and malicious impression that plaintiff had not reported atrocities, including the "Massacre", to his superior officers and that no proof for his charges of such atrocities, command complicity and cover-up existed, and that plaintiff was, therefore, a liar, by reason of the following specific passages thereof, as well as in its entirety:

- (a) "When the Pentagon told Mort Kondracke, the Washington reporter for the Chicago *Sun-Times*, that Franklin had passed a lie detector test denying Herbert had ever reported war crimes to him, Kondracke wrote a lengthy article on the Army's claim. But the New York *Times*, which had given considerable space to earlier news that Herbert had passed a lie detector test, made no mention of the Army's report concerning Franklin."

Upon information and belief, while defendant Lando was aware that the alleged lie detector test taken by Franklin has never been released to the public (nor have its contents, format or testing methods been disclosed) and that the Army refused to permit Franklin and Barnes to be examined by the same expert examiner who had tested plaintiff; the above-quoted statement was written and published to create the false impression that the test had indeed been given and passed as alleged by the Army and that its admission, contents, methods, format and results were comparable to plaintiff's and entitled to the same credibility.

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(b) By following the passage set forth in (a) above with the republication of a segment of "Selling" depicting portions of an interview between defendant Wallace and Franklin wherein Franklin denied plaintiff's charges, defendant Lando maliciously sought to further emphasize Franklin's false statements that he had never discussed war crimes with plaintiff. Defendant Lando republished said segment notwithstanding the malicious and false manner in which "Selling" was written, edited, produced and broadcast as hereinabove alleged.

- (c) "In *Soldier* Herbert claims there are several people who had seen Franklin in Vietnam on February 14. We asked Herbert for names. Not one of those people, in the Army, or out, on the record or off, could back up Herbert's claim."

Upon information and belief, defendant Lando interviewed persons who did support plaintiff's statement that Franklin was present in Vietnam as plaintiff has said, but Lando falsely stated he had not talked to such persons so as to portray plaintiff as a liar.

- (d) "Hill denied telling Herbert he was certain he had seen Franklin returning to Vietnam on February 14. He said he had heard Herbert talking about the killings on the battalion radio that day, but did not know who he was talking to. Nor could he be sure that Herbert had in fact reported those killings to brigade."

Defendant Lando knew that Hill had supported plaintiff in an interview with defendant made in 1972 and had stated that plaintiff spoke over the radio that day over the brigade net, a communication link which went directly only to brigade headquarters. Upon information and belief, defendant Lando misrepresented and distorted said interview in "Affair" as quoted above to carry out his malicious intentions to make plaintiff appear to be a liar.

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- (e) "We also contacted a former chopper pilot, now a civilian, who claimed he had picked Franklin up at Cam Ranh Bay when he returned, and it was after February 14."

Upon information and belief, defendant Lando knew that Cam Ranh Bay was beyond the landing area for 173rd Brigade helicopters and that there were no helicopter flights between Cam Ranh Bay and the Brigade headquarters, and that defendant Lando failed to reveal the existence of persons known to him and/or interviewed by him who supported plaintiff's version of the statements that Franklin returned to headquarters in Vietnam on or before February 14.

(f) Upon information and belief, defendant Lando maliciously failed to reveal during his discussion of the dates that Franklin claimed to be in Hawaii on R & R (Exhibit B, pages 5-6), that the hotel receipt demonstrates a significant reduction in room charges on and after February 13, 1969, thereby supporting plaintiff's statements that Franklin had returned to Vietnam on or before February 14.

(g) By following the discussion set forth in (f) above with the republication of a segment of "Selling" depicting portions of an interview between plaintiff and defendant Wallace, defendant Lando maliciously sought to further emphasize his false and misleading statements regarding Franklin's presence in Hawaii. Said segment was republished notwithstanding the malicious and false manner in which "Selling" was written, edited, produced and broadcast as herein alleged and notwithstanding the oppressive, unusual and hostile circumstances under which plaintiff's interview was conducted, as herein alleged.

43. "Affair" conveyed the false and malicious impression that plaintiff was a liar and that his statements and

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his book "Soldier" were false and untruthful by reason of the following specific passages thereof, as well as in its entirety:

- (a) "Most of *Soldier* is a melange, a kaleidoscope of truth, half-truth, and fabrication."

Upon information and belief, defendant Lando knew that such statement was false, that "Soldier" was a truthful account and that interviews conducted by defendant did not support this false and defamatory charge.

- (b) "A few weeks later, after Hill had had a chance to read *Soldier*, I spoke with him again. 'Herbert is the best battalion commander I ever had', he said. 'But for some reason he's become a liar, it's all so much garbage.'"

Upon information and belief, defendant Lando elicited the alleged statement from Hill by reading to him certain portions of the uncorrected galley proofs of "Soldier" and/or misrepresentating their contents to suggest plaintiff had attacked Hill, in order to goad him to anger at plaintiff; defendant Lando knew that Hill had not read "Soldier" and further that the passages involved were taken out of context or otherwise distorted to cause Hill to doubt plaintiff's integrity and motives; defendant Lando knew that Hill would have reacted differently to "Soldier" had he read the final version; defendant Lando also knew that Hill agreed with the contents of "Soldier", of which he had personal knowledge, as it was finally published.

(c) By following the passage set forth in (b) above with the republication of a segment of "Selling" depicting portions of an interview between defendant Wallace and plaintiff discussing Hill, defendant Lando maliciously sought to further emphasize the false impression of Hill's remarks concerning plaintiff, that Hill neither believed nor supported plaintiff as herein alleged in paragraph

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"29(j)". Defendant Lando republished such segment notwithstanding the malicious and false manner in which "Selling" was written, edited, produced and broadcast as herein alleged.

- (d) "After talking with scores of men who had known Herbert in Vietnam, many of whom still admire him, we could not find a single person who believed that Herbert had been relieved for trying to get war crimes investigated. Most gave other reasons, from personality conflict between Franklin and Herbert, to Barnes' claims that Herbert could not be trusted, could not get along with the brigade staff, or might be using too much firepower against civilian-populated areas."

Upon information and belief, defendant Lando interviewed many persons who believed that plaintiff was relieved from command as a reaction to plaintiff's efforts to have war crimes investigated and supported plaintiff's statements in this regard and falsely stated that not a single person could support plaintiff.

- (e) "Herbert had also claimed that one of the brigade's top enlisted men, Sergeant Major John Bittorie, had been listening in an outer office when Herbert reported to Colonel Franklin an incident of water torture. When the Army CID questioned him, Bittorie denied Herbert's claim. Herbert told me the reason was that although Bittorie himself was retired, he still had two sons in the service and had to worry about their careers. But when I flew to Columbus, Georgia, to interview Bittorie, he again denied having overheard any such report. What about his sons who are in the Army? I asked. He had no sons."

Defendant Lando falsely stated that Bittorie had no sons; upon information and belief, defendant Lando further misrepresented and distorted Bittorie's statements

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concerning plaintiff's charges so as to make it appear that he could not substantiate plaintiff's story; defendant Lando further failed to disclose that Bittorie had not wished to speak with Lando, that he was pressured into doing so by Army personnel acting in concert with defendant Lando.

- (f) "Over the next few weeks, *Sixty Minutes* researcher Mark Frederiksen and I spoke with more than a hundred and twenty people who had known Herbert throughout his career. Some of them had been mentioned in *Soldier*. One after another refuted many of Herbert's claims".

Upon information and belief, defendant Lando's statement that they talked to 120 persons who refuted plaintiff's claims is false; defendant Lando interviewed or was aware of the existence of many persons mentioned in *Soldier* and/or who had served with plaintiff who backed plaintiff totally; defendant Lando was further aware of the results of investigations made by other reporters in which these persons fully supported plaintiff; defendant Lando intended by this passage to create the false and defamatory impression that plaintiff had lied.

- (g) "... proving Herbert was telling the truth ... turned out to be difficult. When I started contacting the people to whom Herbert had directed me, they were, when pinned down, not able to substantiate Herbert's claims, not even on an off-the-record basis. Even as my doubts grew, Herbert kept furnishing new names, new facts, new explanations."

Upon information and belief, defendant Lando inserted this false and malicious statement in "Affair" to further cast plaintiff as a liar whose statements could not be supported or substantiated, notwithstanding defendant's personal knowledge of many persons who did support plaintiff as herein alleged.

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44. "Affair" conveyed the false and malicious impression that plaintiff had never complained of the failure of the Brigade Officers Barnes and Franklin to pursue the atrocity and war crime charges until after My Lai became a matter of great public concern and that plaintiff, for his own opportunist personal ends, took advantage of such concern, by reason of the following specific passages thereof, as well as in its entirety:

- (a) "There is an inexplicable gap of almost eighteen months between the time Herbert was relieved, April 5, 1969, and the day he formally brought his war crime charges to the Army CID September 28, 1970. Herbert claims he was constantly trying to get his charges investigated during that period, but he has no written evidence whatsoever to back up his claim."

Upon information and belief, defendant Lando falsely and maliciously made the above-quoted statement when he knew that plaintiff was working on his war crime charges and command cover-up during the said period between April 5, 1969 and September 28, 1970, and defendant specifically referred therein to "no written evidence" to falsely infer defendant did not know of plaintiff's activities regarding the charges during the said period and to imply that there was no other evidence.

- (b) "According to Herbert, during the several months he spent at Fort Leavenworth, Kansas, after leaving Vietnam, he worked ceaselessly, spent \$8000 of his own money, getting statements, contacting witnesses, all to buttress his war crime case.

"Herbert does have several statements from officers praising him as a commander, which he used to appeal the damaging efficiency report in his record; but there is not a word relating to war crimes.

"It was only after Herbert had been transferred to Fort McPherson, Georgia, where the My Lai

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trials were in full swing, that there is any solid indication he was thinking about reporting war crimes."

Upon information and belief, defendant Lando falsely and maliciously made the above-quoted statement when he knew that plaintiff, while at Fort Leavenworth, Kansas, was working on his charges of war crimes and command cover-up.

- (c) "Nowhere in the entire one hundred and sixty pages of transcript of the official inquiry into Herbert's relief is there any mention by Herbert of war crimes. Why? Herbert first claimed that Army regulations prevented him from including war crime charges in his appeal. Army regulations say nothing of the kind."

Upon information and belief, defendant Lando falsely and maliciously created the impression that plaintiff could have included his charges of atrocities, command complicity and cover-up in the named inquiry, thereby causing plaintiff to appear to have lied about his efforts to have his charges investigated, when defendant knew Army regulations prohibited such inclusion, had seen such regulations and falsely stated their contents.

- (d) By following the passage set forth in (a) above with the republication of a segment of "Selling" depicting portions of an interview between defendant Wallace and Colonel John Douglas, defendant Lando attempted to strengthen his false statement that plaintiff had made no effort to have his charges investigated. Defendant Lando knew such statement was false as herein alleged and republished said segment notwithstanding the mali-

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cious and false manner in which "Selling" was edited, written, produced and broadcast as hereinabove alleged.

- (a) "The Army also produced an official 'fact sheet' disputing Herbert's claims point by point. According to the Army, of the twenty-one allegations made by Herbert to the CID, only seven 'had sufficient substance to warrant action or further investigation'. Of those, three had already been investigated in Vietnam and one was a case that was not under U.S. jurisdiction."

Upon information and belief, defendant Lando created the impression that the Army "fact sheet" was entitled to special credibility rather than a partisan document biased against plaintiff, and further falsely stated that plaintiff had made 21 allegations of which only seven were substantiated, thereby making plaintiff appear to have lied about or falsely exaggerated his charges when defendant Lando knew that plaintiff made 8 charges, 7 of which were substantiated and the eighth not pursued because the individuals involved were dead.

45. "Affair" conveyed the false and malicious impression that plaintiff was a revengeful man who was only concerned with his own personal career and for those purposes improperly exploited the nation's concern over war crimes and that plaintiff was not what he pretended to be, by reason of the following specific passages thereof, as well as in its entirety.

"What to conclude? I don't pretend to know the motives behind the behavior that has brought Herbert to national prominence. It seems plain to me that they included a desire to salvage his threatened career and to seek revenge on Colonel Franklin and General Barnes, and that to do so he exploited the issue of war crimes.

• • •

*Complaint*

"The press, which long had been negligent about dealing with the question of American war crimes, found in Herbert a heroic figure, a martyr through whom to dramatize the issue. But we brought ourselves a martyr with feet of clay."

Upon information and belief, and for the reasons herein alleged, the said statements were maliciously made by defendant Lando to deliberately create a false and defamatory impression of plaintiff.

46. "Affair" conveyed further false and malicious impressions regarding plaintiff, including the following:

(a) That plaintiff had written "Soldier" for the possible money he might receive by falsely stating: "Herbert had shared advance payments of more than \$100,000 with Jim Wooten and their agents for the book." Upon information and belief there was no reason to publish this false statement except defendant Lando's malicious intention to impugn plaintiff's concern regarding war crimes, the cover-up of the crimes and the operations of United States military forces.

(b) That plaintiff was a self-centered egotist by falsely stating that when defendant Lando met plaintiff he "had a chestful of decorations" and, upon information and belief, that defendant Lando knew that plaintiff did not and had not worn any decorations since his return from Vietnam in 1969 and that such false statement was maliciously made to impugn plaintiff's reputation as herein alleged.

(c) That plaintiff sought to gain publicity by exploiting a false issue by reason of falsely stating that "it was only by claiming to be a martyr that Herbert had gained such national prominence.

(d) That false statements implying plaintiff was a paranoid individual were inserted by defendant in an attempt to diminish his own malicious objectives and conduct; as shown in the following statement:

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"As soon as Mike Wallace's TV interview with him was filmed, Colonel Herbert turned on me, in his eyes an admirer now turned enemy, and challenged me to deny that I had originally wanted to write a book about him. I was startled; of course that was true, but I had almost forgotten it. In fact, my interest in collaborating with him had ended even before I developed doubts about his story. . . .

"Herbert kept pressing the point, intimating that all along I had been engaged not in journalism but a vendetta. Angered, I told him that if he went on in this way I would "get" him, that I had recourse to libel action. I came to regret that outburst, because subsequently Colonel Herbert was to cite this confrontation as proof that the CBS television show was a willful plot on my part to discredit him (an impossibility, since others have the last say about the content and purposes of *Sixty Minutes*) and to defile his true story."

Upon information and belief, defendant Lando falsely stated, as herein alleged, that his alleged "doubts" about plaintiff were unrelated to plaintiff's refusal to collaborate, and defendant further falsely distorted his remarks to plaintiff as herein alleged and plaintiff's reactions thereto to create the impression that plaintiff was unstable, and defendant further made this false statement without revealing the oppressive and unusual circumstances surrounding said interview as hereinabove alleged in Paragraph "26".

47. Defendant Company adopted, confirmed and ratified the aforesaid false and defamatory statements contained in "Affair" as well as the article in its entirety and defendant published such adoption, confirmation and ratification as an introduction to said "Affair" in the words set forth on page one of Exhibit B herein annexed and incorporated.

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48. Upon information and belief, at the time of said publication alleged in paragraph "37", defendant Company knew that said "Affair" was false and was intended to destroy plaintiff's reputation and to portray plaintiff as a liar and a brutal and vindictive man.

49. Upon information and belief, at the time of said publication alleged in paragraph "37", defendant Company knew the matters contained in "Affair" as well as "Affair" as a whole to be directly in conflict with the views and knowledge of people other than defendant Lando, and with reckless disregard as to the truth or falsity of said matters and as to the harm done to plaintiff, defendant company published "Affair" as a true portrayal of plaintiff and his conduct.

50. Upon information and belief, after the publication of "Affair" by Defendant Company as herein alleged the false and malicious nature of "Affair" and its defamatory effect upon plaintiff were again brought to the attention of defendant Company. Representatives of plaintiff and persons with knowledge of the false and malicious manner in which "Affair" was written and published requested a retraction or other response by defendant Company on behalf of the truthful facts concerning plaintiff but defendant Company declined to do so and further ratified and affirmed the malicious content and intent of "Affair."

51. The conduct of defendants Lando and Company at all times herein, as set forth above, deliberately and maliciously defamed plaintiff, was accomplished by means which radically departed from usual and normal professional standards of journalism, and resulted in the national publication, circulation and distribution of "Affair" which created and presented false and distorted information and impressions known to defendants to be false and distorted but published with reckless disregard of whether or not they were false and distorted.

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52. By reason of the aforesaid acts of defendants Lando and Company, the publication and circulation of "Affair" caused plaintiff to suffer the following special damages: (a) the publication, distribution and circulation of "Affair" further impaired the value of "Soldier" as a literary property and caused sales to be below expectations; (b) offers and discussions regarding sale of motion picture rights to "Soldier" which took place prior to the publication of "Affair" were discontinued after its publication and no movie rights have been sold; (c) offers and discussions regarding the sale of rights to a filmed lecture series to television, industry and educational institutions which took place prior to the publication of "Affair" were discontinued after its publication and such rights have not been sold; (e) plaintiff's paid speaking engagements and public appearances dropped sharply immediately after the publication of "Affair" and have continued to be far less than prior to such broadcast, all to his special damage in the sum of Two Million Two Hundred Twenty Five Thousand (\$2,225,000.00) Dollars.

53. By reason of the aforesaid acts of defendants, plaintiff has been grievously injured in his good name, character and reputation; plaintiff's reputation among the American public in general as a courageous and honest person dedicated to the welfare of his country has been seriously impaired; plaintiff's reputation, both to the general public and to his friends, acquaintances and former colleagues in the armed forces, as a professional soldier of high moral character has been destroyed; plaintiff's good name and character acquired over many years of dedicated service to his country has been deeply damaged, and plaintiff and his family have been held up to ridicule and contempt by friends, acquaintances, neighbors and the public in general, all to his general damage in the sum of Ten Million (\$10,000,000.00) Dollars.

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WHEREFORE, plaintiff demands judgment:

- (1) against defendants Lando, Wallace and CBS, on the first count in the amount of Twelve Million Five Hundred Thousand (\$12,500,000.00) Dollars as compensatory damages and Ten Million (\$10,000,000.00) Dollars as exemplary damages, with interest thereon, together with the costs and disbursements, including fair and reasonable allowances for counsel fees and other lawful expenses;
- (2) against defendants Lando and Company on the second count in the amount of Twelve Million Two Hundred Twenty Five Thousand (\$12,225,000.00) Dollars as compensatory damages and Ten Million (\$10,000,000.00) Dollars as exemplary damages, with interest thereon, together with the costs and disbursements, including fair and reasonable allowances for counsel fees and other lawful expenses.

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**Exhibit A, Annexed to Complaint**

60 MINUTES

Volume V, Number 9

as broadcast over the

CBS TELEVISION NETWORK

Sunday, February 4, 1973

6:00-7:00 PM, EST

With CBS News Correspondents Morley Safer and  
Mike Wallace

PRODUCED BY CBS NEWS

EXECUTIVE PRODUCER: Don Hewitt

(1) DICK CAVETT: Will you welcome, please, Lieutenant Colonel Anthony Herbert. [Applause]

MIKE WALLACE: As millions of viewers watched, Lieutenant Colonel Herbert described one of the war crimes he said that he had witnessed in Vietnam.

HERBERT: He had a woman by the hair with her head bent back . . . and he had his right arm around her throat with the knife dug in right here. And there was a child holding her leg, screaming, and he had another—the second child buried face-down in the sand with his foot on his head, suffocating him.

WALLACE: And you say it was your insistence on having war crimes investigated that led to your relief from command, right?

HERBERT: I still say it.

WALLACE: Did Colonel Herbert ever report war crimes or atrocities of any nature to you, Colonel Franklin?

COLONEL ROSS FRANKLIN: No.

WALLACE: Never?

FRANKLIN: Never.

. . . . .

*Exhibit A, Annexed to Complaint*

MORLEY SAFER: After a week or two weeks of prodding and pushing, of relentless competition, of harassment and baiting, of the kind of abuse that would get any self-respecting Englishman up in arms if it were animals treated thus, the vacation is almost over.

. . . . .

I'm Morley Safer.

WALLACE: I'm Mike Wallace. Those stories and more, tonight on 60 MINUTES. First, these headline items.

The first American POWs will begin to return from Hanoi by midweek. This, according to a Canadian member of the International Control Commission in Saigon.

Also in Saigon today, North Vietnamese and Viet Cong officials had their first public outing, passing out cigarettes to journalists, answering the questions of passers-by and generally trying to be friendly.

But in Belfast, Northern Ireland, the past 24 hours have been the bloodiest of the year: 10 persons dead, 20 wounded.

60 MINUTES continues in a moment.

(2) [Announcements]

## ["THE SELLING OF COL. HERBERT"]

WALLACE: One of the sad legacies of our years in Vietnam is the distrust of the American military establishment the war planted in the minds of millions of Americans. The Pentagon's efforts to obscure the facts, from Tonkin Gulf to My Lai to General Lavelle, seriously damaged the credibility of the military. And one man who helped to breed suspicion in our minds was Army Lieutenant Colonel Anthony Herbert, now retired.

For the past two years Herbert has been stating and repeating his charges that the American military covered up war crimes in Vietnam. Now he has published a book called "Soldier" which he wrote with James

*Exhibit A, Annexed to Complaint*

Wooten of *The New York Times*. Its publisher is Holt, Rinehart and Winston, a subsidiary of CBS. The book is a savage indictment of the Pentagon in general and some of its top officers in particular. A good deal of Herbert's firepower aims at proving that his military career was destroyed by the Pentagon only because he tried to report war crimes, atrocities, in Vietnam to his superior officers. They wanted to hear none of it, he says, and they broke him because he persisted.

60 MINUTES set out to investigate the validity of Herbert's allegations. In the course of the last year, producer Barry Lando talked with scores of people in and out of the service—people who have known Herbert and the Army. Here is our report.

DICK CAVETT: My first guest tonight is one of America's great war heroes. And he is also one of its war victims. It's an astonishing story. I'll let him tell the rest of it. Will you welcome, please, Lieutenant Colonel Anthony Herbert. [Applause]

WALLACE: "The Dick Cavett Show"—December 30, 1971. As millions of viewers watched, Lieutenant Colonel Herbert described one of the war crimes he said that he had witnessed in Vietnam. Since it took place on February 14, 1969, he calls it the "St. Valentine's Day Massacre".

HERBERT: We had a woman by the hair with her head bent back—there were four dead males lying on the ground by now—and he had his right arm around her throat with the knife dug in right here. And there was a child holding her leg, screaming, and he had another—the second child buried face-down in the sand with his foot on his head, suffocating him.

CAVETT: Who were the men who were doing this, now?

HERBERT: They were Vietnamese, but under an American's charge.

CAVETT: They would be ARVN?

*Exhibit A, Annexed to Complaint*

HERBERT: Well, they were police, is what they really were. They were national police. And just as I looked, he cut the woman's throat and dropped her into the sand. So this made five dead now.

(3) WALLACE: As Herbert tells it, then and now, he tried repeatedly to have this and other alleged war crimes investigated by his commanders in Vietnam. As a result, he says, he was relieved of command and had his career ruined by an Army establishment intent on covering up atrocities.

HERBERT: For people to think that Ernie Medina could have reported those crimes is ridiculous. If Ernie Medina had reported those crimes he'd have been—the bolt of lightning would have come out of the blue so fast that he wouldn't have known what the hell hit him, you know.

WALLACE: There seemed to be good reason for the attention Colonel Herbert has gotten from the public and the media: he was a hero. After all, even the Pentagon had to admit his Army record was outstanding.

He had enlisted at the age of 17, won 22 medals in some of the bloodiest fighting in the Korean War, wrote an account of his exploits, traded books with World War II hero Audie Murphy. He shot up through the ranks of commissioned officers, served as a Ranger, had duty tours in Europe, the Middle East. Then in February 1969 he was given a combat command in Vietnam. His unit: the 2nd Battalion of the 173rd Airborne, based south of Danang. Again Herbert excelled. In only 58 days he won a Silver Star and three Bronze Stars. But then, abruptly, in April of 1969, he was relieved of command by the same officer who had given it to him, General John Barnes.

BARNES: I thought he was a killer. I thought he enjoyed killing and I thought that he would cause me a lot of trouble in the pacification. I don't think he understood the role.

*Exhibit A, Annexed to Complaint*

BARRY LANDO: Do you have any evidence, hard evidence, to show that he was a killer?

BARNES: No, I have no hard evidence other than the fact I know that he enjoyed getting out with squads with an M-16 and leading squads. No other battalion commander did that.

LANDO: Couldn't this just be a sign of bravery?

BARNES: Oh, it certainly could. But the same kind of a thing I didn't want happening in—when we got to the pacification role.

WALLACE: General Barnes elaborated his suspicions about Herbert.

BARNES: I can't pin this thing anywhere, but I just got the feeling, with all these high body counts he had, that some of them were suspect. And that—he would tell different stories as to the body count. He'd come in one day and I'd get a report that so many people were killed, and then when I tried to get the details of it there would be a different figure table. And I just didn't have confidence in him. I'd lost confidence in him as a commander with the ability to control his people.

(4) LANDO: Did Colonel Herbert ever formally or informally report any war crimes or atrocities to you?

BARNES: He himself never did to me. Absolutely not. If he had, I would have taken the same action I did when I learned of atrocities anywhere. If they are under my responsibility, I would have court-martialed the man responsible for it, as I told every replacement that came into the brigade.

WALLACE: General Barnes' deputy commander was Colonel Ross Franklin. It was he who recommended to Barnes that Herbert be relieved. One reason, says Franklin, is that he had come to feel he could not trust Herbert's word.

FRANKLIN: Tactically, he was the best battalion commander we had. I counseled Herbert several times and once I counseled him on telling the truth or being

*Exhibit A, Annexed to Complaint*

more exact in what he said. I told him at that time he could run circles around all the rest of the battalion commanders if he'd just tell the truth.

WALLACE: Did Colonel Herbert ever report war crimes or atrocities of any nature to you, Colonel Franklin?

FRANKLIN: No.

WALLACE: Never?

FRANKLIN: Never.

WALLACE: Verbally or in writing?

FRANKLIN: In no way, neither orally or in writing. This—I had many conversations with Colonel Herbert. We discussed many things, but never war crimes.

WALLACE: After losing his command, Herbert went to Saigon. He requested a formal hearing. An investigation was held. His appeal was denied. Herbert returned to the U. S., was ultimately assigned to Fort McPherson, Georgia. And then in September 1970, 17 months after he had been relieved of command, with the headlines filled with news of the My Lai trials, Colonel Herbert filed his war crimes charges with the Army Inspector General. Six months later, Colonel Herbert went public.

Why would Herbert make such charges if they were just baldly untrue?

FRANKLIN: There's a certain amount of vindiction, certainly. I would say that he probably holds me more responsible for what happened to him than any other officer.

WALLACE: Being relieved of his command?

FRANKLIN: Yes, but I can't really imagine the motivation that would lead to such a monumental thing such as this.

(5) WALLACE: Monumental? What's monumental?

FRANKLIN: He has come up with totally fictional charges that, as far as I'm concerned, has been a hoax on the American people.

*Exhibit A, Annexed to Complaint*

WALLACE: You were relieved. You were given a bad efficiency report.

HERBERT [agreeing]: Mm-hmm.

WALLACE: And you say it was your insistence on having war crimes investigated that led to your relief from command, right?

HERBERT: I still say it.

WALLACE: Okay. Now, in almost all the cases that you claim that you reported war crimes, either to Colonel Franklin or General Barnes, we have only your word against theirs. Nobody else was there.

HERBERT: Mm-hmm.

WALLACE: So what we decided to do was to zero in on the one case where there's a possibility, anyway, of proving who's telling the truth—without relying on your word against their word.

HERBERT: Mm-hmm.

WALLACE: And that's the incident of February 14—the "St. Valentine's Day Massacre," as you've called it. Now, what happened there, briefly?

HERBERT: What happened?

WALLACE: Yeah.

HERBERT: A platoon, I believe it was from B or C Company—

WALLACE: As Colonel Herbert tells it, he spoke with Colonel Franklin twice from the field on February 14. Then, he says, he flew directly back to Landing Zone English to report the killings personally to Franklin.

Well, specifically, on February the 14th in 1969, Colonel Herbert said that he reported to you, first on the radio and then in your command post, the killing of captured Vietnamese by South Vietnamese police while an American adviser was looking on.

FRANKLIN: At that period I was in the Ilikai Hotel in Honolulu, Hawaii, on R & R. I did not return to Vietnam until 16 February, two days after this alleged incident.

*Exhibit A, Annexed to Complaint*

HERBERT: I say that he was there.

WALLACE: And that he's lying?

HERBERT: If he says he wasn't there, I say he's lying.

(6) WALLACE: Can you prove it?

HERBERT: No, I cannot.

WALLACE: 60 MINUTES tried to find out who was telling the truth. Checking with the Ilikai Hotel in Hawaii, we found that Colonel and Mrs. Franklin had indeed been registered there from February 7 to late in the afternoon of February 14. That would already have been February 15 in Vietnam. Colonel Franklin also gave us a cancelled check signed by himself and made out to the Ilikai Hotel for the exact amount of the hotel bill. The check was dated February 14. And we spoke with two Army officers who were in Hawaii at the same time. They say they flew back to Vietnam with Colonel Franklin, taking off from Honolulu late on February 14, arriving at Camranh Bay in Vietnam on February 16, local time.

Let me provide something to you.

HERBERT: Okay.

WALLACE: A check, signed by Ross Franklin, 14 February, in Hawaii, for the full amount of that hotel bill that you have there, which means that he had to be in Hawaii to pay his bill himself on the 14th of February; therefore could not have been where you said he was on the 14th of February.

HERBERT: Mm-hmm. I can probbaly find you checks—I don't know. I can probably find you—I don't know about this check. I can probably find—

WALLACE: Wait a minute. I mean, you say—

HERBERT: I see the check.

WALLACE: Yeah, okay.

HERBERT: I can probably find you a hundred checks that I have either dated for another reason, wrote after the fact, misdated, what have you. I don't know. All

*Exhibit A, Annexed to Complaint*

I know is I saw Ross Franklin there and talked to him. I know that. I know what I saw. I know what I did. And I stick by it and I still say it. And I swear to it and I've sworn to it under oath and I'll swear to it again, you know?

WALLACE: In his book, Colonel Herbert writes that there are several people who can testify that Franklin was in Vietnam on February the 14th. We asked Herbert for the names of those men. We contacted almost every one of them. None could confirm Herbert's claim. Several men serving under Herbert said they had heard Herbert say, while in Vietnam, that he had reported the February 14 killings, but none were certain that he had actually reported them.

BARNES: Why didn't he do something that had a date on it that would prove that he did report those things? He had plenty of time to do it. He left the brigade, he was down in Saigon three months where he (7) had this court of inquiry, this Article 138. He had plenty of time to get something down on a piece of paper, to get it notarized. Why didn't he?

WALLACE: You have no documents to show, not a piece of paper to show that you ever reported a war crime to anybody prior to the time that the My Lai trials were going on at Fort McPherson in Georgia. You were in Fort McPherson, Georgia, at the very same time that those My Lai trials were going on and then suddenly you went public.

HERBERT: Let's say that we—I'm not going to say we don't have documents to show that I reported war crimes in Vietnam. That's not for me to say here. I say that we can prove that I did report them in Vietnam.

WALLACE: You have documents to prove—

HERBERT: I'm not going to say we have documents or not. I just say we have statements—sworn statements—and testimony that will prove that I reported war crimes in Vietnam.

*Exhibit A, Annexed to Complaint*

WALLACE: Have you—have you published them in your book?

HERBERT: I don't think so.

WALLACE: Why?

HERBERT: I didn't—I had no reason to. It was already in the paper, other things. I don't know why. I have lawyers, just like you have lawyers. We didn't put everything out we have.

WALLACE: Earlier, Herbert had tried to put the whole question of his reporting or not reporting atrocities in a different light.

HERBERT: Let's say I didn't, just for the sake of discussion. It would make absolutely no difference if I waited five years to do it. The motive would make no difference whatsoever. The question is: did the crimes occur or didn't they?

WALLACE: Oh.

HERBERT: Were Colonel Franklin and General Barnes well aware of them or weren't they? I say they were and I say I reported them, and it's still there and it still stands.

WALLACE: No. The point is there's no dispute that war crimes occurred in Vietnam. The dispute, it seems, is this: You've called Franklin a liar.

HERBERT: Yes.

WALLACE: You've called Barnes a liar.

HERBERT: Yes.

(8) WALLACE: You said the Army, really, deprived you of your military career because you insisted upon reporting war crimes and they wanted them covered up. And that's really what the issue is here.

HERBERT: And I still say it.

WALLACE: The sprawling U. S. Army base at Longbinh, just outside Saigon. After he lost his battalion, Colonel Herbert went to Longbinh to appeal his relief from command—and also, he says, to present his war crimes charges. One of the officers he spoke with was

*Exhibit A, Annexed to Complaint*

the top U. S. military lawyer and judge in the country, Colonel John Douglass. Herbert claims that Douglass listened to his story and then told him he wouldn't touch war crimes charges against a general with a ten-foot pole.

DOUGLASS: The story, of course, is not correct. He has not recalled the facts, apparently, as they really existed.

WALLACE: All right, what were the facts?

DOUGLASS: Well, the facts as they really existed were that he was brought to my office by an assistant inspector general, as I recall it. That officer explained that Colonel Herbert had been relieved of command and had a complaint about his relief. I said, "Well, I better turn this over to my assistant, Colonel Rector"—who was in the room right next to mine—

WALLACE: Wait a minute. Did he mention war crimes to Colonel Rector?

DOUGLASS: I don't know. If he did, he never mentioned—Colonel Rector never told me about them. And as a matter of fact, Colonel Rector's comments to me were that his complaint was that he'd been improperly relieved and he'd—there was some jealousy, some hard feelings between Franklin and whoever the general was up there, and Herbert.

WALLACE: Barnes.

DOUGLASS: General Barnes and Colonel Herbert. And that he'd been improperly relieved. And it looked like enough of a case that we ought to get a full investigation. I can't believe that if there were war crimes involved and we were trying to stay out of it, as indicated by this passage you've just read to me, that then we'd recommend a full-scale investigation—which we did.

WALLACE: Douglass said that he was irritated by the implication that he wouldn't bring charges against a general.

*Exhibit A, Annexed to Complaint*

DOUGLASS: And I am annoyed, I'm hurt, I'm—I feel that this is an indication that I'm not of a strong enough character to be either a lawyer or an Army officer, and I happen to be both and I'm proud of being both.

WALLACE: But why haven't you said this up to now?

(9) DOUGLASS: Nobody's asked me.

WALLACE: He says you—He's a gentleman, so he won't—

HERBERT: Yeah, and I'm not.

WALLACE: —so he won't call you dirty names, but he says that it's absolutely made up out of the whole cloth. He said that he barely talked to you, you didn't mention war crimes, that he bucked you to his next-in-command, a fellow by the name of Rector.

HERBERT: That's not true. I never saw Rector, ever.

WALLACE: Okay.

But when 60 MINUTES contacted Colonel Rector, he said that he had indeed spoken with Colonel Herbert at some length about his relief from command, but that Herbert never claimed that war crimes had anything to do with it.

In fact, over the past several months, we have spoken with many men who saw Herbert after his relief in Vietnam. Some are still in the service, some are out. Most of them admire Herbert, yet to a man they say that Herbert never once said to them that he had been relieved because he had tried to push war crimes charges.

You claim that the investigation into Barnes and Franklin, conducted by the Army and based on your charges, was a whitewash, right?

HERBERT: Mm-hmm.

WALLACE: Do you remember an attorney by the name of Ken Rosenbloom?

HERBERT: Yes, I do. I was the one that put you in contact with him.

WALLACE: Right.

*Exhibit A, Annexed to Complaint*

While in the Army, handling the Barnes investigation, Ken Rosenbloom was a captain in the Judge Advocate General's Corps. He is now an assistant district attorney on Long Island in New York.

Now, he has charged, as Herbert has charged all along, that the Army's investigation into charges against General Barnes were a whitewash. You worked on the Barnes investigation.

ROSENBLOOM: That's correct. I did.

WALLACE: What do you think?

ROSENBLOOM: It certainly wasn't a whitewash. We traveled all over the country. We took thousands and thousands of pages of transcript. We spoke to witnesses in person and over the telephone. We had access to all the CID files. We were refused nothing and we were permitted to go anywhere that we desired and talk to anyone we desired, in or (10) out of them. We had all of the Army's facilities made available to us, anywhere we wanted to go, we went.

WALLACE: You were present throughout the whole business of investigating Herbert's charges against General Barnes?

ROSENBLOOM: Yes, I was, sir.

WALLACE: And you came up with a verdict that the charges just didn't hold water?

ROSENBLOOM: Essentially that's correct, sir. I tried to approach it in a very open minded way. I have no grudge against the Army, no grudge against Herbert. I knew I was getting out. I was not a career man and so I had no desire to protect the Army nor did I have a desire to protect Herbert.

WALLACE: Are you trying to set the record straight about Anthony Herbert?

ROSENBLOOM: I don't know if the record requires to be set straight. Nobody ever asked me before what happened at the investigation.

*Exhibit A, Annexed to Complaint*

WALLACE: He says no cover-up. He says that they tracked down every lead that he gave them—many of them provided by you—and more. And when they contacted those people they just could not confirm what you said they knew or had seen.

HERBERT: Than let them present the statements and the evidence. I told you the other military lawyer is Dick Heintz, who will verify what we have said. There are—The documents are there. Then let the Army release all the documentation and let the people judge for themselves.

WALLACE: We contacted Herbert's military lawyer, Captain Heintz. He said that, from the few documents that he had seen, he suspected the Army was not doing its best to investigate Herbert's charges. But he said that he could not be at all certain of that until the full investigations are made public.

Another thing that we found out checking out Herbert's book: Although several men who served with Herbert say it's not so, there are others who claim that Herbert was an officer who could be brutal with captured enemy prisoners himself.

You used to have a radioman by the name of Bruce Potter, right?

HERBERT: Yes, I had. Sergeant Bruce Potter.

WALLACE: A man you've spoken highly of and who speaks highly of you.

HERBERT: And I still do, no matter what [indistinct] I still do.

WALLACE: All right.

(11) POTTER: One day we captured two detainees and we had an interpreter with us. We were on a reconnaissance mission. And we took one of the detainees in the air, because neither of them would talk on the ground. And we took him in the air and Colonel Herbert held him in the door of the helicopter. The helicopter then made a bank to the left and Colonel Herbert jolted him a little

*Exhibit A, Annexed to Complaint*

bit to scare him into talking—to think he was going to be thrown out the door. And the interpreter that was with us in the helicopter was questioning him constantly through the flight. And the helicopter then made another bank over the mountains and Colonel Herbert gave him a bigger jerk out the door, and he started talking. And then we flew across the area where the other detainee was being held and threw a sandbag out full of clothes and rocks and things of this nature into the area where he was. He was blindfolded on the ground. And he apparently started talking then, because he was talking very well when we came down. And both of them—We got quite a few—quite a bit of information out of them. They were trail watchers.

LANDO: He started talking why?

POTTER: Because he thought that the other detainee we took in the air was thrown out of the helicopter and that was him hitting the ground rather than the sandbag. This was a method that was thought up on the spur of the moment, I believe, and it worked, definitely worked.

LANDO: Who thought it up?

POTTER: It must have been Colonel Herbert. Had to be.

HERBERT: This is not true.

WALLACE: In other words, Potter's a liar?

HERBERT: No, Potter's mistaken. Potter may remember somebody doing that—

WALLACE: No, no, no, no. Potter told us that he was with you, Colonel Herbert, in the chopper as it went on and he said it was your idea.

HERBERT: I understand what you are saying that Potter said. I say that it is untrue—

WALLACE: All right. All right, now—

HERBERT: —you know?

WALLACE: —another man: Bob Stemmies.

HERBERT: Bob Stemmies?

WALLACE: Do you know him?

*Exhibit A, Annexed to Complaint*

HERBERT: No, he wasn't—didn't work for me, but I do know him, yes.

(12) WALLACE: Well, he was a military intelligence sergeant.

HERBERT: Yes.

WALLACE: You spoke very highly of him on the Cavett show back in '71—September.

HERBERT: Yeah, I spoke—Well, I knew about him as an IG, yes.

WALLACE: Stemmies told us that he was present once with you as a Viet Cong nurse was being interrogated by ARVN troops, being beaten by them to get her to talk, you were there, stood by, did nothing.

HERBERT: Well, let me tell you this. As long as I was in Vietnam, my unit never captured a single nurse. And you won't find anything about a nurse in any of our records.

WALLACE: Do you remember a chopper pilot by the name of Mike Plantz?

HERBERT: No, because Mike—I don't remember him, because Mike Plantz never flew me in Vietnam.

WALLACE: He was based at Landing Zone English.

HERBERT: Yes.

WALLACE: He claims that he was flying a chopper for you, saw you beat up a woodcutter after you went down to check a group of them out; also says that he saw you beat up a VC prisoner being brought back by you to Landing Zone English.

HERBERT: It's false. It's false.

WALLACE: Bill Hill, one of your top company commanders—

HERBERT: Yes.

WALLACE: —has told us that Herbert "is the best battalion commander I've ever had, but for some reason he's become a liar. It's all so much garbage."

*Exhibit A, Annexed to Complaint*

HERBERT: If he's still in the Army, he will do the same as other officers will do, I'm sure, in order to keep their career going. These men are not going to destroy themselves.

WALLACE: In other words, he has simply chickened out and is going along with the Army line against Herbert?

HERBERT: I don't know.

WALLACE: Well, that's what you're suggesting.

HERBERT: I don't even know he said it. You're telling me he said it. But I'm sure he did say it if you say he did. I'm telling you, if Bill Hill feels I'm lying, he's entitled to have that opinion, right?

(13) WALLACE: In checking out Herbert's book, "Soldier," we found numerous stories that, according to the people mentioned in those stories, are not true. One such man is Major Jim Grimshaw, a former company commander who served under Herbert in Vietnam. He thinks that many of the charges in Herbert's book, like the politicking that goes on among Army officers—especially West Point officers—are true. Like many of the officers who served under Herbert, Grimshaw has the highest praise for him. When I interviewed him in the Pentagon, Major Grimshaw was frank to admit his admiration.

GRIMSHAW: I would stick up for Tony Herbert for anything. I'd follow him in combat because I don't think I could keep up with him, he was such a fine combat leader. However, I feel that as an individual, let alone an Army officer, a man must have integrity. Therefore, I would not lie for him or for anybody else.

WALLACE: I asked Jim Grimshaw about the stories in the book that related specifically to him. The most dramatic involved an incident where he and his men supposedly tried to flush some Viet Cong soldiers from a cave without injuring some female civilians also in the cave.

*Exhibit A, Annexed to Complaint*

Major, let me read you from the book, from Herbert's book. He says:

Grimshaw suddenly dropped down to his knees and crawled into the cave, whispering softly in Vietnamese. A couple of minutes later, as his men watched open-mouthed, he, Grimshaw, emerged from the cave carrying a baby in his arms. The three Viet Cong soldiers and the two women followed closely behind. It was cool. Nobody asked him why he did it. He never explained. I submitted him for the Silver Star, the country's third-highest combat decoration. He more than deserved it, but he never received it.

GRIMSHAW: I did not do that.

WALLACE: You didn't go in, come out carrying a baby, followed by three VC soldiers and two women?

GRIMSHAW: I did not.

WALLACE: Did he submit you for the Silver Star? Because I don't see your—At that time?

GRIMSHAW: I have no recollection of being submitted for the Silver Star for that incident. There was another incident, in which my first sergeant recommended me.

WALLACE: But not Herbert?

GRIMSHAW: But not Herbert.

WALLACE: In sum, Major, what do you think about Tony Herbert?

(14) GRIMSHAW: You're asking me before or now?

WALLACE: Now.

GRIMSHAW: Having read the stories about me, and only about me—

WALLACE: Right. Things of which you have certain knowledge.

GRIMSHAW: Right. I would say that there is a kernel of truth, there is a nucleus of truth, but unfortunately, I think that he has expanded some of these stories, which may be great reading to the public but not entirely true. And—

*Exhibit A, Annexed to Complaint*

WALLACE: You seem to say that with—

GRIMSHAW: I say it with resignation—

WALLACE: Reluctance?

GRIMSHAW: —dismay and reluctance. Believe me, if I felt that that was the truth, if I felt that, you know, that was the undeniable truth, I'd stand up in front of everybody and say, "This is the truth." But he's blown it out. He's gone beyond that point and it's a shame.

WALLACE: Do you believe that he was relieved because he wanted to push allegations of war crimes and atrocities? Do you think that's the case?

GRIMSHAW: I don't think that was the cause. I just don't think that was the truth. I feel, somehow, somebody had it in for him, and I don't know who. And it's too bad.

WALLACE: Here we are in the Pentagon. Did anybody here order you to come here and talk to us?

GRIMSHAW: No.

WALLACE: You're your own man?

GRIMSHAW: I'm my own man. I like to think I am. I hope I am.

WALLACE: Jim Grimshaw telephoned Colonel Herbert after we had talked to him. Herbert called us with that news and he claimed that Grimshaw told him that he had spoken with us in the Pentagon only under pressure—that his career was on the line. Herbert told us that was the reason that other officers had also come out against him. When we checked with Grimshaw, he denied telling Herbert that. So to settle the argument, we flew Grimshaw and his wife to New York and had them wait outside listening to our interview with Herbert. When Herbert again intimated that Grimshaw had been pressured by the Pentagon to bad-mouth Herbert, we told Herbert that Grimshaw was there.

(15) HERBERT: Bring him in.

WALLACE: Fine.

*Exhibit A, Annexed to Complaint*

HERBERT: Good. And ask him the same questions.

WALLACE: You can ask him whatever questions you want to. Here he is right now.

HERBERT: Hello, Jim.

GRIMSHAW: Hi, how are you doing?

HERBERT: Very fine.

WALLACE: Jim, have you heard what's been going on between the Colonel and me?

GRIMSHAW: Yes.

HERBERT: Okay.

GRIMSHAW: We started on line at the base of the hill searching caves. You were with me probably 90% of the time.

HERBERT: Yes, that's why I put in for the Silver Star, yes.

GRIMSHAW: But I'm saying—

WALLACE: Wait a minute. You told me that he didn't put in for the Silver Star for you. [Crosstalk]

HERBERT: —saying I didn't put you in for a medal on that, Jim?

GRIMSHAW: Well, because I don't remember you ever putting me in for a medal.

HERBERT: How about the rest of the things in the book?

WALLACE: Have you read the book? Have you read the book?

GRIMSHAW: Yes, I have read the book.

WALLACE: Do you think it's accurate, by and large?

GRIMSHAW: Well, the incidents—We have to talk about the incidents that I'm personally involved in.

WALLACE: All right. Sure.

GRIMSHAW: So, now we're talking three incidents, when you get right down to it.

WALLACE: And you've told me—

(16) GRIMSHAW: I'm telling you two-thirds, then, are not true.

*Exhibit A, Annexed to Complaint*

WALLACE: Were you under any pressure, Jim Grimshaw, to—from the Pentagon or from your commanding officer to show up at the Pentagon for an interview?

GRIMSHAW: No.

HERBERT: Now, you told me that—

GRIMSHAW: Absolutely not.

HERBERT: You told me that.

GRIMSHAW: And I wasn't briefed.

WALLACE: Later in the interview, Grimshaw told Herbert he should have checked out his stories with the people whose names appear in the book.

GRIMSHAW: Why didn't you call guys like myself or Hill or some of these guys?

HERBERT: Okay—

GRIMSHAW: You know, you're making us a public figure—

HERBERT: Okay, wait a minute, Jim.

GRIMSHAW: —whether you want—You know, you're trying to do me a very good job and, in a sense, maybe I think it's because of all the problems that occurred and you maybe want to put us in a good light to the American public. But now you've made me a public figure. I can't help it; I have to speak out.

WALLACE: The deeper we got into this investigation, the more we felt that the way in which the media, including CBS News, reacted to Herbert's allegations was almost as interesting as Herbert's story itself. Several reporters did make an effort to check out Herbert's claims, found his case was far from clear-cut and made that obvious in their reports. Many others did not. *The New York Times* did more, probably, to publicize Tony Herbert's story than any other paper. When Herbert passed a lie-detector test on whether or not he had reported war crimes to Franklin, the *Times* gave it big play. But when the Army said that Colonel Franklin, the man Herbert had accused, had also passed a lie-detector test, other papers reported it but there was not a word about it in the *Times*.

*Exhibit A, Annexed to Complaint*

Attorney Ken Rosenbloom, the former Army lawyer who investigated many of Herbert's charges, says the attitude of the media towards Herbert was understandable.

ROSELNBLOOM: Well, he's highly decorated and a respected soldier, and he makes these charges and he gets a lot of newspaper coverage about it. Because of the temper of the times and what the country wanted (17) to hear, perhaps, or because the media was looking for another hero, they tended to accept these allegations uncritically.

WALLACE: *The New York Times* in Vietnam wanted to talk to you and you wouldn't talk to them?

FRANKLIN: No.

WALLACE: Well, you wouldn't talk to them?

FRANKLIN: Well, the logical conclusion to draw from what you're saying, then, is that if you won't talk to the press, then they can say anything they want.

WALLACE: No.

FRANKLIN: But there's still a responsibility to present the truth.

BARNES: During the long investigation on me, the Army's policy was not to put out any statements at all because of prejudice to others involved in the investigation while it was going on. Therefore, the press had no place else to go for information but back to Herbert, where the source was. And I just think that the press did what they could but they weren't given both sides of the stories. Right or wrong, that's—I think that's what happened.

LANDO: Why not make the investigation public, then?

BARNES: Don't ask me. If I was in charge I would, but I'm not in charge.

HERBERT: One of the things I have said from the beginning is that you'll never know for sure. No one will know the whole truth until the Army releases for publication every single document and statement they

*Exhibit A, Annexed to Complaint*

have, which they have not done unless they've let you read them all. And the second portion is, until they have a full Congressional inquiry to find out is Herbert telling the truth? Is Herbert lying? Is Ross Franklin telling the truth? Is Ross Franklin lying? And lay it all out there for everybody—and I'm sure that's what you're trying to do to some extent tonight and I go along with it.

WALLACE: Okay.

The Army could indeed help resolve the controversy. They could open their files to a public airing. They could make themselves available for questioning about the whole Herbert business. But they won't. I asked former Army Chief of Staff William Westmoreland to talk about it. He refused to be interviewed. I asked General Winant Sidle, the Army's Public Information Chief. He refused, too. Why? We heard two lines of speculation among Pentagon people. One is that the Army doesn't want to help make a martyr of Tony Herbert. And the other is that during their various investigations into Herbert's charges, the Army found so many true stories of war crimes that, irrespective of whether Tony Herbert had reported any of them, the Army just doesn't (18) want to wash that kind of dirty linen in the open. Perhaps the best way to stop all speculation is to do what you heard Anthony Herbert and General Barnes suggest a moment ago: make the Army investigations public.

*Exhibit B, Annexed to Complaint*

THE  
HERBERT  
AFFAIR

by Barry Lando

He seemed to be the perfect soldier, a hero in Korea and in Vietnam. Then he was driven out of the Army, his career ruined because he tried to prevent his superiors from concealing war crimes against the Vietnamese. That was the story a television producer persuaded his superiors at CBS should be presented to a nationwide audience. As the producer and his associates began assembling the facts, they found it changing into a very different story, one that left the reporter disillusioned and the hero threatened with decanonization. The producer here tells how the case unfolded for him, from his first, convincing interviews with Lieutenant Colonel Anthony Herbert, through intensive researching of Herbert's alarming charges against fellow Army officers, to a dramatic confrontation between Herbert and some of those who disputed him on the CBS program, *Sixty Minutes*, shown on February 4 of this year. It is a tangled story, to say the least. One of its lesser anomalies: Herbert's book *Soldier*, now profitably riding the best-seller list, is published by Holt, Rinehart and Winston, which is owned by CBS, the organization that has done the most to attack the book's integrity.

I first met Lieutenant Colonel Anthony Herbert in June 1971. I was an associate producer on the CBS Weekend News, putting together a report about prisoners of war in South Vietnam. I was looking for American veterans with firsthand accounts of brutal treatment meted out to Viet Cong and North Vietnamese POW's. Lieutenant Colonel Herbert seemed a good prospect. A few months earlier, in March, he had publicly charged two Army officers, Brigadier General John W. Barnes and Lieutenant Colonel J. Ross Franklin, with trying to cover up war crimes in Vietnam.

*Exhibit B, Annexed to Complaint*

When I contacted Herbert by phone in Atlanta, he said he could provide me with just the stories I was looking for. He spoke of cold-blooded murder, of women prisoners having the skin ripped off their breasts by bamboo flails. Casually, Herbert added that he had just received notice from the Army that he had been passed over for promotion for the second time and, thus, would be forced to retire by February, 1972. That in itself was a hell of a story, I told him, and I arranged to film an interview the next day.

When we met, I found his appearance as striking as his rhetoric. Tall, iron-hard, with close-cropped hair, he was a military man all the way and had a chestful of decorations to prove it. The story he told me was the same

*Exhibit B, Annexed to Complaint*

as the one he had told reporters from the beginning. While commanding a battalion of the 173rd Airborne Brigade in Vietnam, Herbert had personally witnessed several war crimes. The most horrifying was the one where Vietnamese police, with an American adviser standing by, had murdered four prisoners. Herbert claimed he came upon the executions just as they were finishing. "There were four dead already and they had a knife at the throat of a woman. Her baby was screaming and clutching at her leg, and this other child was being suffocated. One of the men was shoving its face into the sand with his foot. I told them to stop, but the man holding her just looked at me and slit her throat and dropped her to the sand." Since those killings took place on February 14, 1969, Herbert calls them the "St. Valentine's Day massacre."

According to Herbert, he immediately reported all the atrocity cases he witnessed to Colonel J. Ross Franklin, deputy commander of the 173rd. But, Herbert says, Franklin showed no interest in investigating the charges. "He would say I was getting too soft for war, or I was lying." Herbert said he also reported three of the crimes, including the February 14 slayings, to General John Barnes, commander of the 173rd.

Then, his story continues, he kept badgering Franklin about the investigations until abruptly on April 4, 1969, he was relieved of command. During the fifty-eight days he had led the second battalion, his men had outperformed every other battalion in the brigade. Herbert had been awarded one Silver Star, three Bronze Stars, and had been recommended for the Distinguished Service Cross. "All of a sudden," he says, "Barnes and Franklin decided I was no longer fit to command. It was the war crimes. They wanted to get rid of me."

In Saigon, Herbert appealed his relief from command, a full-scale hearing was held, and his appeal was turned down. Herbert said he attempted to make official reports of war crimes to several top officers but "they all refused

*Exhibit B, Annexed to Complaint*

to receipt for my charges." Herbert's relief from command was followed by a bad efficiency report, written by Colonel Franklin, accusing him of having "no ambition, integrity, loyalty, or will for self-improvement."

Over the following months, said Herbert, he vainly attempted to have his war crime charges investigated but was continually put off. Finally, in September, 1970, he made formal war crime charges to the Army's Criminal Investigations Division at Fort McPherson, Georgia. Then, when it looked as if the CID, too, was dragging its heels, on March 12, 1971, Herbert formally accused Barnes and Franklin of trying to cover up war crimes.

Though the investigations were still going on, Herbert said, he doubted that Franklin or Barnes would ever be prosecuted. Still, he had hopes for the Army. "I want to make this an honorable army. I want to help correct it. I wouldn't quit under any circumstances."

I was delighted with the interview. Here was one of the Army's own honest-to-God heroes testifying against it. Herbert *was* a hero. He had enlisted at seventeen, won twenty-two medals in some of the bloodiest fighting of the Korean War, then was sent on a promotional world tour by the Army as an example of the finest of U.S. fighting men. He advanced through the ranks of commissioned officers, was a Ranger instructor, a Green Beret, and served in the Middle East and in Europe. His efficiency reports were always outstanding.

Why shouldn't a report be impressed? For months the Army refused to make any comment on Herbert's charges on the grounds that investigations were still going on. With the Pentagon's recent record from the Tonkin Gulf to My Lai, one would be skeptical of an official explanation. I became fascinated with Herbert's story and

*Exhibit B, Annexed to Complaint*

discussed with him the idea of doing a book about him, or in collaboration with him, though I was in the midst of a job change at CBS. The idea faded away.

In a July, 1971, interview in *Life* magazine, Herbert suggested that war crimes might stop "if we'd hang a couple of senior commanders." In September came his big breakthrough: a lengthy article ("How a Supersoldier Was Fired From His Command") in the Sunday magazine section of the *New York Times*. The piece was written by the *Times* Southern correspondent James T. Wooten. Wooten had covered Herbert since he first made his charges public, and had come to believe fully in the man and most of his claims.

At the time, and for months after, I thought Wooten's article to be an excellent description of Herbert and his case. Unlike several reporters who became suspicious of Herbert soon after they started checking into him, I didn't develop doubts until after several weeks of research. Wooten, who later collaborated with Herbert on his book, *Soldier*, today says he still believes in Herbert. He says he did try to contact General Barnes, but was told that while the Army investigations were under way, Barnes would be unavailable. Franklin had refused to talk with *New York Times* reporters in Vietnam. Wooten says he interviewed none of the other individuals mentioned in *Soldier* to try to check out Herbert's story. As he explains it, the book is not a work of reportage but essentially an autobiography. It ranges from boyhood memories, through Herbert's Korean and cold war experiences, to Vietnam. Although the crucial issue in the book becomes Herbert's war crimes charges, he also accuses the Army of failing to wage the war aggressively, and offers a general critique of the Army on a number of counts.

The *Times* piece led to Herbert's appearance on the Dick Cavett Show, a performance that, according to a delighted Cavett, elicited more viewer response than any other Cavett show. Many politically conservative viewers

*Exhibit B, Annexed to Complaint*

were just as outraged as liberals were by what the Army seemed to have done to Herbert.

The Herbert case began to arouse Congress. Prodded by Representative Edward Hebert, chairman of the House Armed Services Committee, Secretary of the Army Robert Froehlke announced on October 8 that the Army had decided to reverse itself and toss out the poor efficiency report that had brought Herbert's career to a dismal halt. But that decision, said Froehlke, had nothing to do with Herbert's war crime charges. Many Army officers were outraged and the press had a field day. How could the Army deny Herbert's accusations and at the same time redeem him?

On it went, Herbert involved in one flap after another as the Army assigned him to ridiculous jobs and temporarily blocked a second appearance on the Dick Cavett Show. Finally, in November, 1971, Herbert, claiming continued harassment, announced that he had decided to retire from the Army. There was more outrage from the press. "His retirement," the *Times* editorialized, "will leave him free to continue, as he has pledged, a battle that involves far more than his personal honor: the integrity and effectiveness of the U.S. Army." The Knight newspaper chain weighed in: "Shame on the Army for making a scapegoat of Lt. Col. Anthony Herbert." An article in *The New Republic* said Herbert's resignation "is a disgrace to the Army and a tragedy for the nation. The facts about this matter are by now clear enough."

They really were not. For several months, while the Army was investigating Herbert's accusations, the Army General Counsel ordered those officers involved in the charges to keep silent. That order left many officers, particularly several who had served in the 173rd Airborne Brigade, seething. Herbert, on the other hand, continued to broadcast his charges.

*Exhibit B, Annexed to Complaint*

When Army investigators finally cleared General Barnes in October, 1971, the Army partially took the wraps off. Reporters who inquired about the case had interviews arranged for them with several officers who had known Herbert in the 173rd and disputed his charges. Many leveled accusations against Herbert, claiming he himself had treated enemy POW's brutally, had damaged at least one civilian hamlet, and had exaggerated or otherwise misrepresented body counts.

The Army also produced an official "fact sheet" disputing Herbert's claims point by point. According to the Army, of the twenty-one allegations made by Herbert to the CID, only seven "had sufficient substance to warrant action or further investigation." Of those, three had already been investigated in Vietnam and one was a case that was not under U.S. jurisdiction. As for the remaining three incidents, including the February 14 killings, the Army claimed there was no evidence, other than Herbert's own word, that he had actually reported those cases to Franklin and Barnes.

Fueled by such information and interviews provided by the Army, several reporters began to write pieces seriously questioning Herbert's claims. Critics included liberals and conservatives: Paul Dean of the *Arizona Republic*, George Crile of the *Ridder* newspapers, Ken Reich of the *Los Angeles Times*, Peter Braestrup of the *Washington Post*.

When the Pentagon told Mort Kondracke, the Washington reporter for the *Chicago Sun-Times*, that Franklin had passed a lie detector test denying Herbert had ever reported war crimes to him, Kondracke wrote a lengthy article on the Army's claim. But the *New York Times*, which had given considerable space to earlier news that Herbert had passed a lie detector test, made no mention of the Army's report concerning Franklin.

*Exhibit B, Annexed to Complaint*

COL. FRANKLIN: *Tactically, he was the best battalion commander we had. I counseled Herbert several times and once I counseled him on telling the truth or being more exact in what he said. I told him at that time that he could run circles around all the rest of the battalion commanders if he'd just tell the truth.*

MIKE WALLACE: *Did Colonel Herbert ever report war crimes or atrocities of any nature to you, Colonel Franklin?*

FRANKLIN: *No.*

WALLACE: *Never?*

FRANKLIN: *Never.*

WALLACE: *Verbally or in writing?*

FRANKLIN: *In no way, either orally or in writing. I had many conversations with Colonel Herbert, we discussed many things but never war crimes. . . .*

*Exhibit B, Annexed to Complaint*

WALLACE: *Why would Herbert make such charges if they were just baldly untrue?*

FRANKLIN: *I would say that he probably holds me more responsible for what happened to him than any other officer.*

WALLACE: *Being relieved of his command . . . ?*

FRANKLIN: *Yes. But I can't really imagine the motivation that would lead to such a monumental thing such as this.*

WALLACE: *Monumental, what's monumental?*

FRANKLIN: *He has come up with totally fictional charges that as far as I'm concerned, it's been a hoax on the American people.*

*Sixty Minutes, February 4, 1973*

By the end of 1971, the barrage of charges and counter-charges over the Herbert affair had tapered off. The ambivalent conclusion of much of the media was summed up by the title of a piece in the *National Observer*: "Colonel Herbert: A Hero or a Liar."

The reason for that standoff was that most of the Army personnel who had been interviewed and had attacked Herbert were either interested parties such as General Barnes, or men who made damning charges about Herbert's character but had no direct knowledge of the specific charges that Herbert was making. Many other officers, who might have effectively challenged several of Herbert's charges, kept silent either because they had respected him in Vietnam, or because they just did not want to tangle with him. Although many reporters now held strong doubts about Herbert's case, no newspaper, magazine, or network felt compelled to give any investigator the necessary time to probe further and discover who was lying.

Since the first glowing report I had done on Herbert, I had gone to work as a producer for *Sixty Minutes*. One of the first things I did was to push for a story on

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Herbert. I was still convinced he was telling the truth and he had continued to assure me, and other reports, that as soon as he retired in February, 1972, he would make available more documents to substantiate his case. When I flew to Atlanta in March, 1972, Herbert gave me transcripts of a number of telephone interviews with soldiers who seemed to support his claims. He also put me in touch with other men, giving me name after name of people who, he confidently said, would back his stories. I *wanted* to believe in Herbert and I now see that I minimized the many discrepancies in his stories. When I showed Mike Wallace some of the information I had gathered on Herbert, including some newspaper reports questioning his story, Wallace looked through the material and announced that he thought Herbert was lying. His comment made me the more intent on proving Herbert was telling the truth.

That turned out to be difficult. When I started contacting the people to whom Herbert had directed me, they were, when pinned down, not able to substantiate Herbert's claims, not even on an off-the-record basis. Even as my doubts grew, Herbert kept furnishing new names, new facts, new explanations. Then, in April, I received a call from a mutual acquaintance who told me Herbert had claimed that the *Sixty Minutes* show on him was being postponed because we were now planning to devote the full hour to him—his was such an important story—rather than the usual fifteen-or twenty-minute segment.

This was only a minor piece of fiction, but it was without foundation. I had personal knowledge of that. Something finally snapped. The inconsistencies, the evasions I had been so eager to overlook, now took on a different hue.

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In November, 1972, a green-bound uncorrected proof of Herbert's *Soldier* arrived from the publishers. Herbert had shared advance payments of more than \$100,000 with Jim Wooten and their agents for the book. It would be published in a few weeks to almost unanimously favorable reviews.

After being off on other stories, I was back onto Herbert. Over the next few weeks, *Sixty Minutes* researcher Mark Frederiksen and I spoke with more than a hundred and twenty people who had known Herbert throughout his career. Some of them had been mentioned in *Soldier*. One after another refuted many of Herbert's claims.

By the time we were ready to interview Herbert (and others) for the *Sixty Minutes* show, the story had of course turned into something far different from the admiring profile I had thought would result. As soon as Mike Wallace's TV interview with him was filmed, Colonel Herbert turned on me, in his eyes an admirer now turned enemy, and challenged me to deny that I had originally wanted to write a book about him. I was startled; of course that was true, but I had almost forgotten it. In fact, my interest in collaborating with him had ended even before I developed doubts about his story. Herbert kept pressing the point, intimating that all along I had been engaged not in journalism but a vendetta. Angered, I told him that if he went on in this way I would "get" him, that I had recourse to libel action. I came to regret that outburst, because subsequently Colonel Herbert was to cite this confrontation as proof that the CBS television show was a willful plot on my part to discredit him (an impossibility, since others have the last say about the content and purposes of *Sixty Minutes*) and to defile his true story.

The key point in the whole Herbert affair was not whether atrocities had occurred—the Army admitted that some of those described by Herbert did happen—but whether Herbert had actually reported them, and, because

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he insisted on trying to get them investigated, had had his career ruined by a military establishment intent on covering up war crimes. It was only by claiming to be a martyr that Herbert had gained such national prominence.

But how to prove one way or another whether Herbert had reported war crimes in Vietnam? Each instance he cited was a case of one on one: Herbert's word against Franklin's or Barnes's. It was only on my fifth or sixth reading of the Army's fact sheet that one item stuck out: Herbert, the Army claimed, could not have reported the St. Valentine's Day killings to Franklin on February 14, as he described, because Franklin was on R&R in Hawaii on that date and returned to Vietnam only on February 16, Vietnam time.

Yet in *Soldier* Herbert claims it was Franklin who, on February 14, personally ordered Herbert by field radio to turn his prisoners over to the South Vietnamese police. And, after the murders, Herbert says he spoke again by radio to Franklin, then flew directly back to brigade headquarters to report the crime to Franklin.

"Herbert, you're a goddamned liar," Franklin exploded, according to Herbert's book. Herbert offered to get statements to prove his charge. Franklin, wrote Herbert, "stood up, too, and came right up against me. We were nose to nose. 'No, Herbert, no, you won't do that,' he said. 'I'll get the statements and you, Lieutenant Colonel Herbert, will do exactly what I say. Understand.'"

We double-checked Army records to make certain that the action involving the massacre had indeed taken place on February 14. The Army put us in contact with two officers who claim they had flown with Franklin to Hawaii on February 9 and returned with him to Cam Ranh Bay on February 16. Hotel records in Hawaii showed that both officers had been there at the time they claimed. Still, there was doubt. Both officers

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admitted to disliking Herbert. We also contacted a former chopper pilot, now a civilian, who claimed he had picked Franklin up at Cam Ranh Bay when he returned, and it was after February 14. Franklin's bill from the Illikai Hotel in Honolulu had Colonel and Mrs. Franklin registered there from February 7 to February 14. What that meant, said Herbert, was that, since R&R is only five days, Franklin had arrived in Hawaii on the 7th, left on the 12th, which conceivably could have him back at headquarters by the evening of the 14th.

To substantiate this, Herbert claims in *Soldier* that the receipt Franklin produced from the Illikai Hotel was signed by his wife. "Did Franklin, an airborne colonel, just stand by while his wife handled the payment of their hotel bill? It doesn't add up. You're on R and R and the wife joins you. Five days later you head back to Vietnam and your unit, and your wife, as many of them do, stays on for a day or two."

At our request, Herbert sent us a copy of the hotel "receipt" signed by Mrs. Franklin. A check with the Illikai showed that what Herbert had was not the receipt, but the *registration form*. That seemed to buttress Franklin's claim that his wife had checked in a couple of days before him.

Colonel Franklin also gave us a cancelled check, dated February 14, 1969, signed by him and made out to the Illikai for the hotel bill. It could not have been postdated because it was made out, in handwriting apparently the same as the signature, for the exact amount of the final bill, down to the last penny. Nor could it have been mailed later, since it was cashed the first business day after it was written.

HERBERT (on being shown Franklin's check): *I can probably find you checks, I don't know, I can probably find you—I don't know about this check, I can probably find you—*

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WALLACE: Wait a minute, you . . .

HERBERT: I see the check . . .

WALLACE: OK.

HERBERT: *I can probably find you a hundred checks that I have either dated for another reason, wrote after the fact, misdated—I don't know. All I know is that I saw Ross Franklin there and talked to him. I know that, I know what I saw, I know what I did. And I stick by it and I still say it. And I swear to it and I've sworn to it under oath. And I'll swear to it again. You know.*

In fact, in *Soldier* Herbert is totally confused on his dates. He says that Franklin was not present when Herbert took over command of the battalion on February 6 because he "had gone on R&R to Hawaii." Two days later by his account, on February 8, "Franklin was back

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behind his desk, and he greeted me warmly." But when Herbert comes to explain Franklin's hotel receipt, he places him in Hawaii from February 7 (February 8 Vietnam time) to February 12.

In *Soldier* Herbert claims there are several people who had seen Franklin in Vietnam on February 14. We asked Herbert for names. Not one of those people, in the Army or out, on the record or off, could back up Herbert's claim.

The key person was Captain Bill Hill, a strapping, blond, former football player from the University of Oklahoma, who had served under Herbert in Vietnam and had had nothing but praise for him. When Herbert and I phoned Hill from Atlanta in March, 1972, Hill said he thought Franklin had been in Vietnam on the fourteenth. Later, when I spoke with Hill by phone, he said he could not be sure he had seen Franklin there. I relayed that information to Herbert. A few hours later still, Herbert called me back, claiming that Hill had phoned him to say he clearly remembered seeing Franklin returning from R&R on the fourteenth, that because he was still in the Army and had a career to worry about, he didn't want to get mixed up in Herbert's case, and that from now on, both Herbert and the press should leave him alone.

I then called Hill and asked if I could meet him; he said, yes, no problem. I wound up spending three hours talking with him at the Oklahoma City airport. Contrary to what Herbert had led me to believe, Hill was completely straightforward.

"Herbert," he said, "is a junior Patton. He was a great battalion commander, but he was in the wrong war. In another war Herbert might have become Chief of Staff, but this war was too political. The thing he loved was fighting, combat, but with pacification, fighting was gone."

Hill denied telling Herbert he was certain he had seen Franklin returning to Vietnam on February 14. He said he had heard Herbert talking about the killings on the

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battalion radio that day, but did not know who he was talking to. Nor could he be sure that Herbert had in fact reported those killings to brigade.

Hill also vehemently denied telling Herbert he couldn't talk because he was worried about his career. "Herbert has gone off the deep end on a bunch of this. I used to rave about him to my wife. It kills my soul about him because I admired him so much."

A few weeks later, after Hill had had a chance to read *Soldier*, I spoke with him again. "Herbert is the best battalion commander I ever had," he said. "But for some reason he's become a liar, it's all so much garbage."

WALLACE: *Bill Hill, one of your top company commanders, has told us that Herbert is "the best battalion commander I ever had. But for some reason he's become a liar, it's all so much garbage."*

HERBERT: *If he's still in the Army, he will do the same as other officers will do, I'm sure, in order to keep their careers going. These men are not going to destroy themselves.*

WALLACE: *In other words, he has simply chickened out and is going along with the Army line against Herbert?*

HERBERT: *I don't know. I don't know that he said it. You're telling me he said it. I'm sure he did say it if you say he did. I'm telling you, if Bill Hill feels I'm lying, he's entitled to that opinion, right?*

Herbert had also claimed that one of the brigade's top enlisted men, Sergeant Major John Bittorie, had been listening in an outer office when Herbert reported to Colonel Franklin an incident of water torture. When the Army CID questioned him, Bittorie denied Herbert's claim. Herbert told me the reason was that although Bittorie himself was retired, he still had two sons in the service and had to worry about their careers. But when I flew

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to Columbus, Georgia, to interview Bittorie, he again denied having overheard any such report. What about his sons who are in the Army? I asked. He had no sons.

After talking with scores of men who had known Herbert in Vietnam, many of whom still admire him, we could not find a single person who believed that Herbert had been relieved for trying to get war crimes investigated. Most gave other reasons, from personality conflict between Franklin and Herbert, to Barnes's claims that Herbert could not be trusted, could not get along with the brigade staff, or might be using too much firepower against civilian-populated areas.

There is an inexplicable gap of almost eighteen months between the time Herbert was relieved, April 5, 1969, and the day he formally brought his war crime charges to the Army CID, September 28, 1970. Herbert claims he was constantly trying to get his charges investigated during that period, but he has no written evidence whatsoever to back up his claim. We contacted all the Army officers Herbert said he had tried to report war crimes to while in Saigon. Most recalled talking with Herbert about his request for a formal inquiry into his relief from command. But all, including Colonel John Douglas, the Army's top lawyer and judge in Vietnam, denied that Herbert ever mentioned war crimes.

DOUGLAS: *I can't believe that if there were war crimes involved and we were trying to stay out of it—as indicated by this passage [from Soldier] you just read to me—that we'd then recommend a full-scale investigation [into Herbert's relief], which we did.*

WALLACE (to the audience): *Douglas said that he was irritated by the implication that he wouldn't bring charges against a general.*

DOUGLAS: *And I am annoyed, I'm hurt. I feel that this is an indication that I'm not of strong enough character to be either a lawyer or an Army officer, and I happen to be both, and I'm proud of being both.*

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WALLACE: *But why haven't you said this up to now?*  
DOUGLAS: *Nobody asked me.*

Nowhere in the entire one hundred and sixty pages of transcript of the official inquiry into Herbert's relief is there any mention by Herbert of war crimes. Why? Herbert first claimed that Army regulations prevented him from including war crime charges in his appeal. Army regulations say nothing of the kind. Herbert then claimed he did try to raise the charges during his appeal, but was advised not to by General Joseph Russ, the presiding officer. General Russ denies this. So do the court recorder and the military lawyer assigned to Herbert's case.

According to Herbert, during the several months he spent at Fort Leavenworth, Kansas, after leaving Vietnam, he worked ceaselessly, spent \$8000 of his own money, getting statements, contacting witnesses, all to buttress his war crimes case. Herbert does have several statements from officers praising him as a commander, which he used to appeal the damaging efficiency report in his record; but there is not a word relating to war crimes.

It was only after Herbert had been transferred to Fort McPherson, Georgia, where the My Lai trials were in full swing, that there is any solid indication he was thinking about reporting war crimes. And it may well be that in bringing those charges, Herbert was as concerned with covering himself as with attacking Franklin and Barnes. Jim Wooten wrote in his Sunday New York Times piece on Herbert: "He began to discuss his experience with some Army lawyers at Fort McPherson. They kept recommending that I'd better make sure those things I'd seen were investigated," he said, "It made sense to me to try to follow the book on this and clear myself."

HERBERT: *I'm not going to say we have documents or not. I can say we have statements, sworn statements and testimony that will prove that I have reported war crimes in Vietnam.*

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WALLACE: *Have you published them in your book?*

HERBERT: *I don't think so.*

WALLACE: *Why?*

HERBERT: *I had no reason to, it was already in the paper, other things. I don't know why. I have lawyers just like you have lawyers. We didn't put everything out that we have.*

Herbert claims that the Army's investigations into Barnes and Franklin were a whitewash. Since the Army, citing legal precedent, refused to release the investigations, there was no way to be absolutely certain Herbert was not correct.

Then Herbert put me in contact with Ken Rosenblum. As a captain in the Judge Advocate General's Corps, Rosenblum had done the nuts-and-bolts work during the Army's investigation of General Barnes. He had access to much of the material in the Franklin investigation as well.

"You should talk to him," Herbert told me. He added that he had already called Rosenblum on my behalf and that Rosenblum was now out of the Army and could talk freely. I was shaken. After all I had found out, I thought it inconceivable that Herbert was telling the truth. But if he was not, why put me in contact with Rosenblum?

I flew to Islip, Long Island, to talk with Rosenblum. He is a quiet-spoken, young assistant district attorney, and he assured me, quite calmly, that there had been no cover-up. "We spent hours taking statements from Herbert," he said. "And for several months I was Herbert's telephone buddy. He kept calling me up with additional suggestions of people to talk to. We went all over the country following his leads, chasing people down, but when it came to the critical facts, the people he had told us would support his claims just did not. You know, I think he has reached the point where he really believes

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his charges." Rosenblum is only one of several people, including Colonel Franklin, who deny Herbert's charges but feel that Herbert himself *believes* he is telling the truth. How else explain Herbert's volunteering the names of so



many individuals, such as Rosenblum, who rather than confirm his story actually undermine it?

Most of *Soldier* is a mélange, a kaleidoscope of truth, half-truth, and fabrication. A few examples:

—According to *Soldier*, in 1968, shortly after Herbert had come to the 173rd, three Americans were found staked out, tortured to death by North Vietnamese. A few days later three NVA soldiers were spotted staked out on the same spot. A note pinned to one of the bodies explained that the three had been executed by the NVA themselves as punishment for having tortured the Americans. According to Herbert, Major Walt Werner reported the inci-

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dent exactly as it had occurred, but his battalion commander refused to accept it. "What the hell was Werner trying to do, he asked, credit the North Vietnamese Army with humane actions? . . . [Werner] was encouraged to alter his report. He refused—and that took guts." That, suggested Herbert, was the reason Werner had not received an assignment he had wanted in Vietnam.

"Somebody's imagination is running a little wild," Werner told me. "An incident like that did happen, but it was two years earlier at Khe Sanh. It was reported by myself and others without any problem. It had nothing to do with my not getting the job I wanted."

—Master Sergeant Roy Bumgarner, who served under Herbert, was charged with having murdered three Vietnamese peasants in cold blood, blown off their heads with a grenade, then produced several Chinese weapons which he claimed he found on their bodies to substantiate his story that they were enemy soldiers. Herbert ridicules the charges, and depicts himself defending a hapless Bumgarner's constitutional rights against badgering military investigators.

Herbert ends his account without mentioning that Bumgarner was ultimately court-martialed and found guilty on the basis of overwhelming evidence.

—Captain Jim Grimshaw, who served under Herbert in Vietnam, supposedly tried to flush some Viet Cong soldiers from a cave where they were hiding, without injuring some female civilians and children also in the cave. To do that, Grimshaw heroically crawled into the cave, emerged a couple of minutes later "carrying a baby in his arms. . . . The three Viet Cong soldiers and the two women followed closely behind. It was cool. Nobody asked him why he did it, he never explained. I submitted him for the Silver Star. . . . But he never received it."

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When I phoned Grimshaw to ask him about that and other stories involving him, he denied that the incident had ever occurred. Nor, he said, had Herbert ever submitted him for a Silver Star. A few days later, I was surprised to receive a long letter from Grimshaw: "I thought Herbert was a fine commander and man," he wrote, "and I would do what I could to help him—anything, except lie."

—Even the General's duck. According to Herbert, General Barnes kept a duck as a mascot, sometimes ordering his men, only half-jokingly, to salute it. One night in a rage, Herbert supposedly killed it and had duck sandwiches a few hours later with Sergeant Major Bittorie.

Bittorie denies this, and the general who succeeded Barnes inherited the duck long after Herbert had left. When presented with this denial, Herbert first claimed that he had not meant to name Bittorie but another sergeant, and now denies that Bittorie's name was ever in the book regarding the duck incident. But it is—page 400.

We checked some tales in *Soldier* about Herbert's exploits prior to Vietnam. One after another, the stories he told were refuted by men who, usually, had no axes to grind.

Other yarns describe Herbert's James Bond-like activity in the Middle East—serving as a finger man for political assassins, and aborting a zany extortion-espionage plot involving British and American girls from sensitive posts in the Middle East who were photographed in compromising positions while bedded down in the Dominican Republic. All those stories met with incredulous denials by officials who had served with or over Herbert during that time.

Herbert recounts how, while serving in Europe with U.S. Rangers, he arranged for his men to receive special training from the famed Nazi commando, Otto Skorzeny, who had set up a "School of Commando Tactics" in the

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mountains of Spain. Skorzeny, after reading Herbert's account, says "everything is invented from A-Z."

One of the few reviewers to question Herbert's credibility discovered inaccuracies in his account of Korean experiences. S. L. A. Marshall wrote in the *National Review*: "As for where the truth lies in this incident, and the reliability of Mr. Herbert's testament, if his recollection of what happened around An Khê and Tuy Hoa in Vietnam is no better than his recall of experience in Korea, the grading should be zero minus. Having been there at the same time, moving through the same scenes with the same outfits, I say that he dilates expansively on things that never happened."

Discrepancies had also turned up in Herbert's first book, *Conquest to Nowhere*, about the Korean War. Its co-author, Robert Niemann, had tried to check out some of Herbert's stories.

After answering some of Niemann's queries, a man known in the book as "Bernstein" wrote: "When I saw 'Herb' over the New Year I was appalled by how bad his memory has grown. He was very mixed up on many facts and points of information. I would advise you to check carefully any facts used in promotional work. Those things can backfire. In all confidence I knew 'Herb' better than anyone in the company and he was always prone to exaggeration and looseness in this way. I say this as a friend who understands him and not in the least way to deprecate him. He's just that way."

When we tracked down "Bernstein" in New York, he confirmed having written the letter, on January 18, 1954.

In January, 1973, Herbert made yet another appearance, his third, on the Dick Cavett Show. It was like old home week. No sooner had Herbert sat down than he unveiled his newest claim; classified Pentagon documents, filched for him by a friend at the Pentagon, demonstrated that

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the Army had been out to ruin him by any available means. "It says in effect," he told Cavett, "that once the publicity dies down, we will get this guy."

In fact, the documents say nothing of the kind. Herbert had sent us a set weeks before. If anything, they show that the Army had decided to bring no legal or administrative action against Herbert, although some officers felt action was justified.

Cavett did not ask Herbert to produce the documents. In a follow-up story on those documents, a New York Times reporter included in his tentative lead the fact that "a careful examination of the copies of the documents obtained by the New York Times also reveals them to be less dramatic than Colonel Herbert's description of them on the Dick Cavett Show of January 23, which illuminates the ambiguities that have permeated the Herbert case for three years." An editor ordered that lead dropped on the grounds that it was opinion, not fact.

Our *Sixty Minutes* show on Herbert was aired in February. What was most surprising in the wake of it was the reaction of Holt, Rinehart and Winston, the publishers of *Soldier* (and, incidentally, a company owned by CBS). There was no reaction. Without divulging the tone of our report, I had spoken with Donald Hutter, the editor at Holt who was handling *Soldier*, a few days before we went on the air.

"Essentially," he had said, "this is a book about the military profession and a man dedicated to trying to awaken us to the corruption of that profession. I am privileged to be part of it."

After our show had been broadcast, I had thought that Holt would try to contact us, if only as a precaution against a libel suit. How serious were the flaws in Herbert's story? What else did we have on him? The book, after all, is replete with potentially actionable attacks against several military officers. But there was no call from Holt.

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When I was preparing this piece, I called Holt. There were a number of pictures in the book and I thought it very likely that at least three of them were not what the captions purported. When I told Hutter why I was doubtful, he admitted: "I can't say I examined them that carefully. Tony gave them to us and they seem to be what he said they were. But I can't say they are categorically, myself."

"There is no question in our mind about the substantial validity of Tony's story."

The views of Aaron Asher, Holt vice-president, are much the same. "We are only responsible for a general feeling of accuracy," he says, "not to check out every detail."

What to conclude? I don't pretend to know the motives behind the behavior that has brought Herbert to national prominence. It seems plain to me that they included a desire to salvage his threatened career and to seek revenge on Colonel Franklin and General Barnes, and that to do so he exploited the issue of war crimes.

The Army has not released the contents of its investigation into the Herbert affair. The Army is not compelled to do so. There is no recent precedent for such disclosure, though it would presumably go a long way toward clearing the air. The Army, however, may well resist publishing the information because it would include many accounts of atrocities that would further damage the Army's own reputation.

It is important not to let the vagaries of the Herbert affair obscure the fact that atrocities did occur, before Herbert's eyes and the eyes of countless others. Indeed, the argument can be made that Herbert, whatever his distortions and inventions, is to be thanked for keeping the nation's eyes on the war crimes issue. But I am not comfortable with that argument, because it forgets the responsibility of the press. The press, which long had been

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negligent about dealing with the question of American war crimes, found in Herbert a heroic figure, a martyr through whom to dramatize the issue. But we bought ourselves a martyr with feet of clay. □



**Answer of Mike Wallace and Columbia Broadcasting System**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[TITLE OMITTED IN PRINTING.]

Defendants Mike Wallace (hereinafter "Wallace") and Columbia Broadcasting System, Inc. (hereinafter "CBS") by Coudert Brothers, their attorneys, in answer to plaintiff's complaint respectfully allege:

AS AND FOR A FIRST DEFENSE

1. The complaint fails to state a claim upon which relief can be granted.

AS AND FOR A SECOND DEFENSE  
(Answering the First Count)

2. Deny knowledge or information sufficient to form a belief as to each and every allegation contained in paragraphs "1" and "2" of plaintiff's complaint; except, with respect to paragraph "2" thereof, admit that at some time prior to his retirement, plaintiff brought charges against his immediate superior officers relative to a cover-up of atrocities during the Vietnam War.

3. Deny knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph "3" of plaintiff's complaint; except admit that, as an employee of CBS, Lando served as the producer of a segment [entitled "The Selling of Colonel Herbert" (hereinafter "Selling")] of the CBS television program entitled "60 Minutes", said program having been broadcast over the CBS Television Network on February 4, 1973 from the City, County and State of New York.

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4. Admit each and every allegation contained in paragraphs "4" and "5" of plaintiff's complaint.

5. Deny knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph "6" of plaintiff's complaint.

6. Deny each and every allegation contained in paragraph "7" of plaintiff's complaint; except admit that plaintiff enlisted in the United States Army at 17 years of age, rose in the ranks and toured the United States and foreign countries for or on behalf of the United States Army, and enjoyed a good reputation for courage under fire, but deny knowledge or information sufficient to form a belief as to the allegation that plaintiff was selected by General M. B. Ridgeway in November, 1951 as the outstanding American soldier in Korea.

7. Upon information and belief, deny each and every allegation contained in paragraph "8" of plaintiff's complaint; except admit that plaintiff was relieved of command by his superior Brigade officer and that a poor efficiency rating placed against his record was subsequently removed by the Secretary of the Army.

8. Deny each and every allegation contained in paragraph "9" of plaintiff's complaint.

9. Deny each and every allegation contained in paragraph "10" of plaintiff's complaint; except admit that in September of 1970 plaintiff's charges of war crimes were made to the Third Army Inspector General at Fort McPherson, that said charges were referred to the U.S. Army Criminal Investigation Division (USACIDA) and that in or about March of 1971, plaintiff filed formal charges against General Barnes and Colonel Franklin.

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10. Deny each and every allegation contained in paragraph "11" of plaintiff's complaint; except admit that in or about March of 1971, it became known beyond the military and Department of Defense that plaintiff was charging war crimes and command cover-up and that said charges and knowledge of said charges became a matter of wide public interest.

11. Upon information and belief, deny each and every allegation contained in paragraphs "12" and "13" of plaintiff's complaint; except admit upon information and belief that Barry Lando (hereinafter "Lando") first met plaintiff at Natural Bridge, Virginia on or about July 1, 1971.

12. Deny each and every allegation contained in paragraph "14" of plaintiff's complaint.

13. Deny each and every allegation contained in paragraph "15" of plaintiff's complaint; except admit that, at the time of the production, presentation and broadcast of "Selling" defendants Lando and Wallace were employees of defendant CBS.

14. Deny each and every allegation contained in paragraphs "16" of plaintiff's complaint; except insofar as paragraph "3" of this answer contains specific admissions and further admit that the program "60 Minutes" was broadcast to millions of viewers.

15. Deny each and every allegation contained in paragraph "17" of plaintiff's complaint.

16. Deny each and every allegation contained in paragraph "18" of plaintiff's complaint including its subparagraphs; except admit that annexed to the plaintiff's complaint as Exhibit "A" is an audio transcript of "Selling".

17. Deny each and every allegation contained in paragraphs "19", "20", "21" and "23" of plaintiff's complaint.

*Answer of Mike Wallace and Columbia Broadcasting System*

18. Deny each and every allegation contained in paragraph "22" of plaintiff's complaint.

19. Deny each and every allegation contained in paragraph "24" of plaintiff's complaint; except admit that statements attributed to Captain Heintz do appear in the audio transcript annexed to plaintiff's complaint as Exhibit "A".

20. Deny each and every allegation contained in paragraph "25" of plaintiff's complaint; except admit that "Selling" was presented for approximately thirty-five minutes and that, except for that portion of the interview during which both plaintiff and Major James Grimshaw were present, plaintiff was interviewed in New York without the presence of any other person who appeared on the program.

21. Deny each and every allegation contained in paragraph "26" of plaintiff's complaint including the subparagraphs thereof; except admit that, in the presence of the executive producer of "60 Minutes", plaintiff accused defendant Lando of producing "Selling" out of spite because defendant Lando had not written the book on plaintiff; and defendant Lando responded thereto by stating that if plaintiff continued to make this kind of accusation, defendant Lando would "get" plaintiff by suing him for libel.

22. Deny each and every allegation contained in paragraphs "27" and "28" of plaintiff's complaint.

23. Deny each and every allegation contained in paragraph "29" including the subparagraphs thereof; except as to subparagraph (a), admit that an interview with Major James Grimshaw was conducted in the Pentagon; and as to subparagraph (g) admit that "Selling" reported that numerous persons interviewed supported plaintiff's leadership as a Battalion Commander and some denied that plaintiff was a brutal or a ruthless killer.

*Answer of Mike Wallace and Columbia Broadcasting System*

24. Deny each and every allegation contained in paragraphs "30", "31", "32", "33" and "34" of plaintiff's complaint.

AS AND FOR A THIRD DEFENSE

25. The matter complained of was based on information communicated to defendants by reliable persons and from reliable sources and was believed by defendants to be true and a fair and accurate report of public and official proceedings. Said matter was published by defendants in good faith, without malice.

AS AND FOR A FOURTH DEFENSE

26. The publication charged to be defamatory is privileged under the First and Fourteenth Amendments to the Constitution of the United States and maintenance of this action would therefore violate the rights of the defendants under the United States Constitution.

WHEREFORE, defendants, Mike Wallace and Columbia Broadcasting System, Inc. pray for judgment dismissing plaintiff's complaint, together with costs and disbursements of this action.

Yours, etc.

COUDERT BROTHERS

By s/s

A Member of the Firm  
Attorneys for Defendants Mike Wallace  
and Columbia Broadcasting System,  
Inc.

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*Answer of Barry Lando*

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[TITLE OMITTED IN PRINTING.]

Defendant, BARRY LANDO, by RICHARD G. GREEN, his attorney, for his answer to the complaint herein:

1) Denies each and every allegation contained in paragraphs 9, 13, 17, 19, 20, 23, 27, 28, 30, 31, 33, 34, 38, 39, 51, 52 and 53.

2) Denies knowledge or information sufficient to form a belief as to each and every allegation contained in paragraphs 48 and 49.

3) Denies each and every allegation contained in paragraph 1, except the matter in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand (\$10,000.00) Dollars.

4) With respect to paragraph 2, denies knowledge or information sufficient to form a belief as to when plaintiff caused to be written a book entitled "SOLDIER."

5) Denies each and every allegation contained in paragraph 3, except that at all times hereinafter mentioned defendant Lando is and was an employee of defendant COLUMBIA BROADCASTING SYSTEM, INC. (misnamed in paragraph 3 of the complaint COLUMBIA BROADCASTING SYSTEMS, INC.) in which capacity he produced a segment, entitled "THE SELLING OF COL. HERBERT" (hereinafter "Selling") of a program entitled "SIXTY MINUTES," which was broadcast on the CBS Television Network from its studio in New York City on February 4, 1973, and who, subsequent thereto, wrote and submitted to ATLANTIC MONTHLY COMPANY (hereinafter "Company") an article entitled "THE

*Answer of Barry Lando*

HERBERT AFFAIR" (hereinafter "Affair") which was published in the May, 1973 issue of "THE ATLANTIC MONTHLY" magazine (hereinafter "Monthly").

6) Denies each and every allegation contained in paragraph 7 except plaintiff enlisted in the United States Army at 17 years of age, rose in the ranks and toured the United States and foreign countries representing the United States Army and had a good reputation for courage under fire, and defendant Lando denies knowledge or information sufficient to form a belief as to the truth of the allegation that plaintiff was selected by Gen. Matthew B. Ridgeway in November, 1951 as the outstanding American soldier in Korea.

7) Denies each and every allegation contained in paragraph 8 except plaintiff was relieved of command by his superior brigade officers and a poor efficiency rating was placed against his record which was subsequently removed by the Secretary of the Army upon review.

8) Denies each and every allegation contained in paragraph 10 except in September, 1970 plaintiff made charges to the Third Army Inspector General at Fort McPherson, and said charges were subsequently referred to the U. S. Army Criminal Investigation Division Agency (USACIDA), and in or about March of 1971, plaintiff filed formal charges against General Barnes and Colonel Franklin.

9) Denies each and every allegation contained in paragraph 11 except in or about March, 1971 it became known beyond the military and Department of Defense and it became a matter of wide public interest that plaintiff was charging war crimes and command cover-up.

10) Denies each and every allegation contained in paragraph 12 except defendant Lando first met plaintiff at Natural Bridge, Virginia in or about July 1, 1971.

11) Denies each and every allegation contained in paragraph 14.

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12) Denies each and every allegation contained in paragraph 15 except defendants Lando and Wallace are and at the time of the production, presentation and broadcast of "Selling", were employees of defendant CBS.

13) Denies each and every allegation contained in paragraph 16 except "Selling" was produced by defendant Lando and was broadcast by defendant CBS on February 4, 1973 to millions of viewers.

14) Denies each and every allegation contained in paragraph 18 including all its subparagraphs except, an audio transcript of "Selling" as broadcast on CBS is annexed to the complaint as Exhibit "A".

15) Denies each and every allegation contained in paragraph 21.

16) Denies each and every allegation contained in paragraph 22.

17) Denies each and every allegation contained in paragraph 24 except defendant Lando interviewed Captain Richard Heintz, and statements attributed to Captain Heintz appeared in "Selling".

18) Denies each and every allegation contained in paragraph 25 except "Selling" was presented for approximately 35 minutes of air time and that except for the portion of the interview during which both plaintiff and Major James Grimshaw were present, plaintiff was interviewed in New York by defendant Wallace without the presence of any other person who appeared on the program.

19) Denies each and every allegation contained in paragraph 26 including all its subparagraphs, except, as to subparagraph (e) defendant Lando, after the interview and outside the interview room, responded to plaintiff's accusation that defendant Lando produced the program out of spite because defendant Lando was not writing

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the book on plaintiff by stating that if plaintiff continued to make this kind of accusation, defendant Lando would "get" plaintiff by suing him for libel; and as to subparagraph (f) the executive producer of SIXTY MINUTES was present at said interview.

20) Denies each and every allegation contained in paragraph 29 including all its subparagraphs, except, as to subparagraph (a) an interview of Major James Grimshaw was conducted in the Pentagon, in a smaller, less comfortable studio, than the environment of plaintiff's interview, with Army personnel in attendance; and as to subparagraph (g) "Selling" reported that numerous persons interviewed supported plaintiff's leadership as a battalion commander and some denied that plaintiff was a brutal or a ruthless killer.

21) Denies knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph 32 except denies defendant Lando's activities were malicious.

22) Repeats the answers hereinbefore made to each and every allegation repeated and realleged in paragraph 35 of the complaint.

23) Denies knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph 36 except "Monthly" is a magazine of national circulation.

24) Denies each and every allegation contained in paragraph 37 except "Affair" was distributed by defendant "Company" in the May, 1973 issue of "Monthly", Volume 231, Number 5.

25) Denies each and every allegation contained in paragraph 40 except a copy of "Affair" as published in "Monthly" is annexed to the complaint as Exhibit "B" and defendant Lando wrote the article "Affair" except for the introductory first paragraph and defendant Lando did not draw or select the illustrations for the article.

*Answer of Barry Lando*

26) Denies each and every allegation contained in paragraph 41 including all its subparagraphs, except, as to subparagraph (a) the words quoted were used in "Affair" (p. 75, Exhibit "D" of the complaint, hereinafter "Ex. B."), but the quotation is not a complete paragraph, as indicated in the complaint, but is a part of a paragraph which reads in full:

*When Army investigators finally cleared General Barnes in October, 1971, the Army partially took the wraps off. Reporters who inquired about the case had interviews arranged for them with several officers who had known Herbert in the 173rd and disputed his charges. Many leveled accusations against Herbert, claiming he himself had treated enemy POW's brutally, had damaged at least one civilian hamlet, and had exaggerated or otherwise misrepresented body counts.*

(Emphasis above and hereinafter added to show material omitted from quotation in complaint)

; and denies defendant Lando maliciously omitted any facts in "Affair" and denies knowledge or information sufficient to form a belief as to the remainder of subparagraph (a); as to subparagraph (b) the words quoted were used in "Affair" (p. 76, Ex. B), but the quotation is not a complete paragraph, as indicated in the complaint, but is extracted from the middle of a paragraph which reads in full:

*The reason for that standoff was that most of the Army personnel who had been interviewed and had attacked Herbert were either interested parties such as General Barnes, or men who made damning charges about Herbert's character but had no direct knowledge of the specific charges that Herbert was making. Many other officers, who might have effectively challenged several of Herbert's charges,*

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*kept silent, either because they had respected him in Vietnam, or because they just did not want to tangle with him. Although many reporters now held strong doubts about Herbert's case, no newspaper, magazine, or network felt compelled to give any investigator the necessary time to probe further and discover who was lying.*

; as to subparagraph (c) the words quoted were used in "Affair" (p. 79, Ex. B), but the quotation is not a complete paragraph, as indicated in the complaint, but is only the beginning of the paragraph which reads in full:

*It was only after Herbert had been transferred to Fort McPherson, Georgia, where the My Lai trials were in full swing, that there is any solid indication he was thinking about reporting war crimes. And it may well be that in bringing those charges, Herbert was as concerned with covering himself as with attacking Franklin and Barnes. Jim Wooten wrote in his Sunday New York Times piece on Herbert: "He began to discuss his experience with some Army lawyers at Fort McPherson. 'They kept recommending that I'd better make sure those things I'd seen were investigated,' he said. 'It made sense to me to try to follow the book on this and clear myself.'"*

; and as to subparagraph (d) the words quoted were used in "Affair" (p. 80, Ex. B) as quoted.

27) Denies each and every allegation contained in paragraph 42 including all its subparagraphs, except, as to subparagraph (a) the words quoted were used in "Affair", (p. 25, Ex. B) as quoted, and denies knowledge or information sufficient to form a belief as to whether the Army refused to permit Franklin and Barnes to be examined by the same expert examiner who had tested plaintiff; as

*Answer of Barry Lando*

to subparagraph (c) the words quoted were used in "Affair" (p. 78, Ex. B) as quoted; as to subparagraph (d) the words quoted were used in "Affair" (p. 78, Ex. B) as quoted; and as to subparagraph (e) the words quoted were used in "Affair" (p. 77, Ex. B), but the quotation is not a complete paragraph as indicated in the complaint, but comes from the middle of a longer paragraph which reads in full:

*We double-checked Army records to make certain that the action involving the massacre had indeed taken place on February 14. The Army put us in contact with two officers who claimed they had flown with Franklin to Hawaii on February 9 and returned with him to Cam Ranh Bay on February 16. Hotel records in Hawaii showed that both officers had been there at the time they claimed. Still, there was doubt. Both officers admitted to disliking Herbert. We also contacted a former chopper pilot, now a civilian, who claimed he had picked Franklin up at Cam Ranh Bay when he returned, and it was after February 14. Franklin's bill from the Illikai Hotel in Honolulu had Colonel and Mrs. Franklin registered there from February 7 to February 14. What that meant, said Herbert, was that, since R&R is only five days, Franklin had arrived in Hawaii on the 7th, left on the 12th, which conceivably could have him back at headquarters by the evening of the 14th.*

28) Denies each and every allegation contained in paragraph 43 including all its subparagraphs, except, as to subparagraph (a) the words quoted were used in "Affair" (p. 80, Ex. B), but the quotation is not a complete paragraph, as indicated in the complaint, inasmuch as the paragraph quoted ends with the phrase "A few examples:" and then continues for a column and a half to cite examples; as

*Answer of Barry Lando*

to subparagraph (b) the words quoted were used in "Affair" (p. 78, Ex. B) as quoted; as to subparagraph (d) the words quoted were used in "Affair" (p. 78, Ex. B) as quoted; as to subparagraph (e) the words quoted were used in "Affair" (p. 78, Ex. B) as quoted; as to subparagraph (f) the words quoted were used in "Affair" (p. 76 Ex. B), but the quotation is not a complete paragraph, as indicated in the complaint, but is from a paragraph which reads in full:

*After being off on other stories, I was back onto Herbert. Over the next few weeks, SIXTY MINUTES researcher Mark Frederiksen and I spoke with more than a hundred and twenty people who had known Herbert throughout his career. Some of them had been mentioned in SOLDIER. One after another refuted many of Herbert's claims.*

; as to subparagraph (g) the words quoted were used in "Affair" (p. 76, Ex. B), but the quotation is taken out of context, the first six words coming from one paragraph, the balance coming from the succeeding paragraph, and the two paragraphs read in full:

*Since the first glowing report I had done on Herbert, I had gone to work as a producer for SIXTY MINUTES. One of the first things I did was to push for a story on Herbert. I was still convinced he was telling the truth and he had continued to assure me, and other reporters, that as soon as he retired in February, 1972, he would make available more documents to substantiate his case. When I flew to Atlanta in March, 1972, Herbert gave me transcripts of a number of telephone interviews with soldiers who seemed to support his claims. He also put me in touch with other men, giving me name after name of people who, he confidently said, would back his stories. I WANTED to believe in*

*Answer of Barry Lando*

*Herbert and now I see that I minimized the many discrepancies in his stories. When I showed Mike Wallace some of the information I had gathered on Herbert, including some newspaper reports questioning his story, Wallace looked through the material and announced that he thought Herbert was lying. His comment made me the more intent on proving Herbert was telling the truth.*

*That turned out to be difficult. When I started contacting the people to whom Herbert had directed me, they were, when pinned down, not able to substantiate Herbert's claims, not even on an off-the-record basis. Even as my doubts grew, Herbert kept furnishing new names, new facts, new explanations. Then, in April, I received a call from a mutual acquaintance who told me Herbert had claimed that the SIXTY MINUTES show on him was being postponed because we were now planning to devote the full hour to him—his was such an important story—rather than the usual fifteen-or-twenty-minute segment.*

29) Denies each and every allegation contained in paragraph 44 including all its subparagraphs, except, as to subparagraph (a) the words quoted were used in "Affair" (p. 78, Ex. B), but the quotation is not a complete paragraph, as indicated in the complaint, but is only the first part of the paragraph, which reads in full:

*There is an inexplicable gap of almost eighteen months between the time Herbert was relieved, April 5, 1969, and the day he formally brought his war crime charges to the Army CID, September 28, 1970. Herbert claims he was constantly trying to get his charges investigated during that period, but he has no written evidence whatsoever to back up his claim.*

*Answer of Barry Lando*

*We contacted all the Army officers Herbert said he had tried to report war crimes to while in Saigon. Most recalled talking with Herbert about his request for a formal inquiry into his relief from command. But all, including Colonel John Douglas, the Army's top lawyer and judge in Vietnam, denied that Herbert ever mentioned war crimes.*

; as to subparagraph (b) the words quoted were used in "Affair" (p. 79, Ex. B), what appears to be a second paragraph in the complaint is not a paragraph but is part of the first paragraph, and the last paragraph is incomplete, the complete paragraphs reading in full:

*According to Herbert, during the several months he spent at Fort Leavenworth, Kansas, after leaving Vietnam, he worked ceaselessly, spent \$8,000 of his own money, getting statements, contacting witnesses, all to buttress his war crimes case. Herbert does have several statements from officers praising him as a commander, which he used to appeal the damaging efficiency report in his record; but there is not a word relating to war crimes.*

*It was only after Herbert had been transferred to Fort McPherson, Georgia, where the My Lai trials were in full swing, that there is any solid indication he was thinking about reporting war crimes. And it may well be that in bringing those charges, Herbert was as concerned with covering himself as with attacking Franklin and Barnes. Jim Wooten wrote in his Sunday New York TIMES piece on Herbert: "He began to discuss his experience with some Army lawyers at Fort McPherson. 'They kept recommending that I'd better make sure those things I'd seen were investigated,' he said: 'It made sense to me to try to follow the book on this and clear myself.'"*

*Answer of Barry Lando*

; as to subparagraph (c) the words quoted were used in "Affair" (p. 79, Ex. B) but the quotation is not a complete paragraph, as indicated in the complaint, but is only the first part of the paragraph which reads in full:

Nowhere in the entire one hundred and sixty pages of transcript of the official inquiry into Herbert's relief is there any mention by Herbert of war crimes. Why? Herbert first claimed that Army regulations prevented him from including war crime charges in his appeal. Army regulations say nothing of the kind. *Herbert then claimed he did try to raise the charges during his appeal, but was advised not to by General Joseph Russ, the presiding officer. General Russ denies this. So do the court recorder and the military lawyer assigned to Herbert's case.*

; and as to subparagraph (e) the words quoted were used in "Affair" (p. 75, Ex. B) but the quotation is not a complete paragraph, as indicated in the complaint, but is only the first part of the paragraph which reads in full:

The Army also produced an official 'fact sheet' disputing Herbert's claims point by point. According to the Army, of the twenty-one allegations made by Herbert to the CID, only seven 'had sufficient substance to warrant action or further investigation.' Of those, three had already been investigated in Vietnam and one was a case that was not under U.S. jurisdiction. *As for the remaining three incidents, including the February 14 killings, the Army claimed there was no evidence other than Herbert's own word, that he had actually reported those cases to Franklin and Barnes.*

*Answer of Barry Lando*

30) Denies each and every allegation contained in paragraph 45 except, the words quoted were used in "Affair" (p. 81, Ex. B) but the quotation that appears to follow the first quoted paragraph does not follow it, said quotation is not a complete paragraph and the complete paragraphs read in full:

What to conclude? I don't pretend to know the motives behind the behavior that has brought Herbert to national prominence. It seems plain to me that they included a desire to salvage his threatened career and to seek revenge on Colonel Franklin and General Barnes, and that to do so he exploited the issue of war crimes.

*The Army has not released the contents of its investigation into the Herbert affair. The Army is not compelled to do so. There is no recent precedent for such disclosure, though it would presumably go a long way toward clearing the air. The Army, however, may well resist publishing the information because it would include many accounts of atrocities that would further damage the Army's own reputation.*

*It is important not to let the vagaries of the Herbert affair obscure the fact that atrocities did occur before Herbert's eyes and the eyes of countless others. Indeed, the argument can be made that Herbert, whatever his distortions and inventions, is to be thanked for keeping the nation's eyes on the war crimes issue. But I am not comfortable with that argument, because it shifts the responsibility of the press. The press, which long had been negligent about dealing with the question of American war crimes, found in Herbert a heroic figure, a martyr through whom to dramatize the issue. But we bought ourselves a martyr with feet of clay.*

*Answer of Barry Lando*

31) Denies each and every allegation contained in paragraph 46 except the words quoted in subparagraphs (a), (b) and (c) appear in "Affair" (pp. 76, 73 and 77, Ex. B) as quoted; and the words quoted in subparagraph (d) appear in "Affair" (p. 76, Ex. B), but what appears to be the first quoted paragraph is not the beginning of that paragraph, and what appears to be a second quoted paragraph is in fact part of the first quoted paragraph which reads in full:

*By the time we were ready to interview Herbert (and others) for the Sixty Minutes show, the story had of course turned into something far different from the admiring profile I had thought would result. As soon as Mike Wallace's TV interview with him was filmed, Colonel Herbert turned on me, in his eyes an admirer now turned enemy, and challenged me to deny that I had originally wanted to write a book about him. I was startled; of course that was true, but I had almost forgotten it. In fact, my interest in collaborating with him had ended even before I developed doubts about his story. Herbert kept pressing the point, intimating that all along I had been engaged not in journalism, but a vendetta. Angered, I told him that if he went on in this way I would "get" him, that I had recourse to libel action. I came to regret that outburst, because subsequently Colonel Herbert was to cite this confrontation as proof that the CBS television show was a willful plot on my part to discredit him (an impossibility, since others have the last say about the content and purposes of SIXTY MINUTES) and to defile his true story.*

32) Denies that the statements referred to in paragraph 47 were false and defamatory, and denies knowledge or information sufficient to form a belief as to each and every

*Answer of Barry Lando*

other allegation contained in paragraph 47, except admits "Company" published the introduction to "Affair" in the words set forth on the first page of Exhibit B.

33) Denies knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph 50 except denies "Affair" was false and malicious and contained malicious content and intent.

AS AND FOR A FIRST COMPLETE DEFENSE TO  
EACH CAUSE OF ACTION

34) The complaint fails to state a cause of action upon which relief can be granted.

AS AND FOR A SECOND COMPLETE DEFENSE TO  
EACH CAUSE OF ACTION

35) The publications charged to be defamatory are privileged under the First and Fourteenth Amendments to the Constitution of the United States and maintenance of this action would therefore violate the rights of defendant Lando under the Constitution of the United States.

AS AND FOR A THIRD COMPLETE DEFENSE TO  
EACH CAUSE OF ACTION

36) The publications charged to be defamatory were based on information communicated to defendant Lando by reliable persons and from reliable sources and were believed by defendant to be true and a fair and accurate report regarding the course and conduct of public and official proceedings, published by defendant Lando in good faith without malice, and said publications are therefore privileged.

*Answer of Barry Lando*AS AND FOR A FOURTH COMPLETE DEFENSE  
TO THE SECOND CAUSE OF ACTION

37) Defendant Lando was privileged as to the contents of Exhibit B because it was necessary and appropriate to defend his reputation against statements concerning him which had been made by plaintiff.

WHEREFORE, defendant Lando respectfully prays that this Court enter a judgment dismissing the complaint and awarding defendant Lando his reasonable costs and disbursements, together with such other and further relief as the Court may deem just and proper.

New York, N. Y.  
March 15, 1974

RICHARD G. GREEN  
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Barry Lando  
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New York, N. Y. 10020  
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**Amended Answer of Defendant Lando**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[TITLE OMITTED IN PRINTING.]

Defendant, BARRY LANDO, by RICHARD G. GREEN, his attorney, for his amended answer to the complaint herein:

1) Denies each and every allegation contained in paragraphs 9, 13, 17, 19, 20, 23, 27, 28, 30, 31, 33, 34, 38, 39, 51, 52 and 53.

2) Denies knowledge or information sufficient to form a belief as to each and every allegation contained in paragraphs 48 and 49.

3) Denies each and every allegation contained in paragraph 1 except the matter in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand (\$10,000.00) Dollars.

4) With respect to paragraph 2, denies knowledge or information sufficient to form a belief as to when plaintiff caused to be written a book entitled "SOLDIER."

5) Denies each and every allegation contained in paragraph 3, except that at all times hereinafter mentioned defendant Lando is and was an employee of defendant COLUMBIA BROADCASTING SYSTEM, INC. (misnamed in paragraph 3 of the complaint COLUMBIA BROADCASTING SYSTEMS, INC.) in which capacity he produced a segment, entitled "THE SELLING OF COL. HERBERT" (hereinafter "Selling") of a program entitled "SIXTY MINUTES" which was broadcast on the CBS Television Network from its studio in New York City on February 4, 1973, and who, subsequent thereto, wrote and submitted to ATLANTIC MONTHLY COMPANY (hereinafter "Company") an article entitled "THE HERBERT

*Amended Answer of Defendant Lando*

AFFAIR" (hereinafter "Affair") which was published in the May, 1973 issue of "THE ATLANTIC MONTHLY" magazine (hereinafter "Monthly").

6) Admits each and every allegation contained in paragraph 6 except denies upon information and belief that defendant "Company" is, or at the times mentioned in the complaint, was engaged in any business in the State of New York, including, without limitation, the publication, distribution or sale in New York State of "Monthly".

7) Denies each and every allegation contained in paragraph 7 except plaintiff enlisted in the United States Army at 17 years of age, rose in the ranks and toured the United States and foreign countries representing the United States Army and had a good reputation for courage under fire, and defendant Lando denies knowledge or information sufficient to form a belief as to the truth of the allegation that plaintiff was selected by Gen. Matthew B. Ridgeway in November, 1951 as the outstanding American soldier in Korea.

8) Denies each and every allegation contained in paragraph 8 except plaintiff was relieved of command by his superior brigade officers and a poor efficiency rating was placed against his record which was subsequently removed by the Secretary of the Army upon review.

9) Denies each and every allegation contained in paragraph 10 except in September, 1970 plaintiff made charges to the Third Army Inspector General at Fort McPherson and said charges were subsequently referred to the U.S. Army Criminal Investigation Division Agency (USACIDA), and in or about March of 1971, plaintiff filed formal charges against General Barnes and Colonel Franklin.

10) Denies each and every allegation contained in paragraph 11 except in or about March, 1971 it became known beyond the military and Department of Defense and it became a matter of wide public interest that plaintiff was charging war crimes and command cover-up.

*Amended Answer of Defendant Lando*

11) Denies each and every allegation contained in paragraph 12 except defendant Lando first met plaintiff at Natural Bridge, Virginia in or about July 1, 1971.

12) Denies each and every allegation contained in paragraph 14.

13) Denies each and every allegation contained in paragraph 15, except defendants Lando and Wallace are and at the time of the production, presentation and broadcast of "Selling", were employees of defendant CBS.

14) Denies each and every allegation contained in paragraph 16, except "Selling" was produced by defendant Lando and was broadcast by defendant CBS on February 4, 1973 to millions of viewers.

15) Denies each and every allegation contained in paragraph 18 including all its subparagraphs except, an audio transcript of "Selling" as broadcast on CBS is annexed to the complaint as Exhibit "A".

16) Denies each and every allegation contained in paragraph 21.

17) Denies each and every allegation contained in paragraph 22.

18) Denies each and every allegation contained in paragraph 24 except defendant Lando interviewed Captain Richard Heintz, and statements attributed to Captain Heintz appeared in "Selling".

19) Denies each and every allegation contained in paragraph 25 except "Selling" was presented for approximately 35 minutes of air time and that except for the portion of the interview during which both plaintiff and Major James Grimshaw were present, plaintiff was interviewed in New York by defendant Wallace without the presence of any other person who appeared on the program.

*Amended Answer of Defendant Lando*

20) Denies each and every allegation contained in paragraph 26 including all its subparagraphs, except, as to subparagraph (e) defendant Lando, after the interview and outside the interview room, responded to plaintiff's accusation that defendant Lando produced the program out of spite because defendant Lando was not writing the book on plaintiff by stating that if plaintiff continued to make this kind of accusation, defendant Lando would "get" plaintiff by suing him for libel; and as to subparagraph (f) the executive producer of SIXTY MINUTES was present at said interview.

21) Denies each and every allegation contained in paragraph 29 including all its subparagraphs, except, as to subparagraph (a) an interview of Major James Grimshaw was conducted in the Pentagon, in a smaller, less comfortable studio, than the environment of plaintiff's interview, with Army personnel in attendance; and as to subparagraph (g) "Selling" reported that numerous persons interviewed supported plaintiff's leadership as a battalion commander and some denied that plaintiff was a brutal or a ruthless killer.

22) Denies knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph 32 except denies defendant Lando's activities were malicious.

23) Repeats the answers hereinbefore made to each and every allegation repeated and realleged in paragraph 35 of the complaint.

24) Denies knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph 36 except "Monthly" is a magazine of national circulation.

25) Denies each and every allegation contained in paragraph 37 except "Affair" was published by defendant "Company" in the May, 1973 issue of "Monthly", Volume 231, Number 5.

*Amended Answer of Defendant Lando*

26) Denies each and every allegation contained in paragraph 40 except a copy of "Affair" as published in "Monthly" is annexed to the complaint as Exhibit "B" and defendant Lando wrote the article "Affair" except for the introductory first paragraph and defendant Lando did not draw or select the illustrations for the article.

27) Denies each and every allegation contained in paragraph 41 including all its subparagraphs, except as to subparagraph (a) the words quoted were used in "Affair" (p. 75 Exhibit "B" of the complaint, hereinafter "Ex. B."), but the quotation is not a complete paragraph, as indicated in the complaint, but is a part of a paragraph which reads in full:

*When Army investigators finally cleared General Barnes in October, 1971, the Army partially took the wraps off. Reporters who inquired about the case had interviews arranged for them with several officers who had known Herbert in the 173rd and disputed his charges. Many leveled accusations against Herbert, claiming he himself had treated enemy POW's brutally, had damaged at least one civilian hamlet, and had exaggerated or otherwise misrepresented body counts.*

(Emphasis above and hereinafter added to show material omitted from quotation in complaint)

; and denies defendant Lando maliciously omitted any facts in "Affair" and denies knowledge or information sufficient to form a belief as to the remainder of subparagraph (a); as to subparagraph (b) the words quoted were used in "Affair" (p. 76, Ex. B), but the quotation is not a

*Amended Answer of Defendant Lando*

complete paragraph, as indicated in the complaint, but is extracted from the middle of a paragraph which reads in full:

*The reason for that standoff was that most of the Army personnel who had been interviewed and had attacked Herbert were either interested parties such as General Barnes, or men who made damning charges about Herbert's character but had no direct knowledge of the specific charges that Herbert was making. Many other officers, who might have effectively challenged several of Herbert's charges, kept silent, either because they had respected him in Vietnam, or because they just did not want to tangle with him. Although many reporters now held strong doubts about Herbert's case, no newspaper, magazine or network felt compelled to give any investigator the necessary time to probe further and discover who was lying.*

; as to subparagraph (c) the words quoted were used in "Affair" (p. 79, Ex. B), but the quotation is not a complete paragraph, as indicated in the complaint, but is only the beginning of the paragraph which reads in full:

*It was only after Herbert had been transferred to Fort McPherson, Georgia, where the My Lai trials were in full swing, that there is any solid indication he was thinking about reporting war crimes. And it may well be that in bringing those charges, Herbert was as concerned with covering himself as with attacking Franklin and Barnes. Jim Wooten wrote in his Sunday New York Times piece on Herbert: "He began to discuss his experience with some Army lawyers at Fort McPherson. 'They kept recommending that I'd better make sure those things I'd seen were investigated,' he said. 'It made sense to me to try to follow the book on this and clear myself.'"*

*Amended Answer of Defendant Lando*

; and as to subparagraph (d) the words quoted were used in "Affair" (p. 80, Ex. B) as quoted.

28) Denies each and every allegation contained in paragraph 42 including all its subparagraphs, except, as to subparagraph (a) the words quoted were used in "Affair", (p. 75 Ex. B) as quoted, and denies knowledge or information sufficient to form a belief as to whether the Army refused to permit Franklin and Barnes to be examined by the same expert examiner who had tested plaintiff; as to subparagraph (c) the words quoted were used in "Affair" (p. 78, Ex. B) as quoted; as to subparagraph (d) the words quoted were in "Affair" (p. 78, Ex. B) as quoted; and as to subparagraph (e) the words quoted were used in "Affair" (p. 77, Ex. B), but the quotation is not a complete paragraph as indicated in the complaint, but comes from the middle of a longer paragraph which reads in full:

*We double-checked Army records to make certain that the action involving the massacre had indeed taken place on February 14. The Army put us in contact with two officers who claimed they had flown with Franklin to Hawaii on February 9 and returned with him to Cam Ranh Bay on February 16. Hotel records in Hawaii showed that both officers had been there at the time they claimed. Still, there was doubt. Both officers admitted to disliking Herbert. We also contacted a former chopper pilot, now a civilian, who claimed he had picked Franklin up at Cam Ranh Bay when he returned, and it was after February 14. Franklin's bill from the Illikai Hotel in Honolulu had Colonel and Mrs. Franklin registered there from February 7 to February 14. What that meant, said Herbert, was that, since R&R is only five days, Franklin had arrived in Hawaii on the 7th, left on the 12th, which conceivably could have him back at headquarters by the evening of the 14th.*

*Amended Answer of Defendant Lando*

29) Denies each and every allegation contained in paragraph 43 including all its subparagraphs, except, as to subparagraph (a) the words quoted were used in "Affair" (p. 80 Ex. B), but the quotation is not a complete paragraph, as indicated in the complaint, inasmuch as the paragraph quoted ends with the phrase "A few examples:" and then continues for a column and a half to cite examples; as to subparagraph (b) the words quoted were used in "Affair" (p. 78, Ex. B) as quoted; as to subparagraph (d) the words quoted were used in "Affair" (p. 78, Ex. B) as quoted; as to subparagraph (e) the words quoted were used in "Affair" (p. 78, Ex. B) as quoted; as to subparagraph (f) the words quoted were used in "Affair" (p. 76 Ex. B), but the quotation is not a complete paragraph, as indicated in the complaint, but is from a paragraph which reads in full:

*After being off on other stories, I was back onto Herbert. Over the next few weeks, SIXTY MINUTES researcher Mark Frederiksen and I spoke with more than a hundred and twenty people who had known Herbert through his career. Some of them had been mentioned in SOLDIER. One after another refuted many of Herbert's claims.*

; as to subparagraph (g) the words quoted were used in "Affair" (p. 76, Ex. B), but the quotation is taken out of context, the first six words coming from one paragraph, the balance coming from the succeeding paragraph, and the two paragraphs read in full:

*Since the first glowing report I had done on Herbert, I had gone to work as a producer for SIXTY MINUTES. one of the first things I did was to push for a story on Herbert. I was still convinced he was telling the truth and he had continued to assure me, and other reporters, that as soon as he retired in February, 1972, he would make available more documents to substantiate his case. When I*

*Amended Answer of Defendant Lando*

*flew to Atlanta in March, 1972, Herbert gave me transcripts of a number of telephone interviews with soldiers who seemed to support his claims. He also put me in touch with other men, giving me name after name of people who, he confidently said, would back his stories. I WANTED to believe in Herbert and now I see that I minimized the many discrepancies in his stories. When I showed Mike Wallace some of the information I had gathered on Herbert, including some newspaper reports questioning his story, Wallace looked through the material and announced that he thought Herbert was lying. His comment made me the more intent on proving Herbert was telling the truth.*

*That turned out to be difficult. When I started contacting the people to whom Herbert had directed me, they were, when pinned down, not able to substantiate Herbert's claims, not even on an off-the-record basis. Even as my doubts grew, Herbert kept furnishing new names, new facts, new explanations. Then, in April, I received a call from a mutual acquaintance who told me Herbert had claimed that the SIXTY MINUTES show on him was being postponed because we were now planning to devote the full hour to him—his was such an important story—rather than the usual fifteen-or-twenty minute segment.*

30) Denies each and every allegation contained in paragraph 44 including all its subparagraphs, except, as to subparagraph (a) the words quoted were used in "Affair" (p. 78, Ex. B), but the quotation is not a complete paragraph, as indicated in the complaint, but is only the first part of the paragraph, which reads in full:

*There is an inexplicable gap of almost eighteen months between the time Herbert was relieved, April 5, 1969, and the day he formally brought his war*

*Amended Answer of Defendant Lando*

crime charges to the Army CID, September 23, 1970. Herbert claims he was constantly trying to get his charges investigated during that period, but he has no written evidence whatsoever to back up his claim. *We contacted all the Army officers Herbert said he had tried to report war crimes to while in Saigon. Most recalled talking with Herbert about his request for a formal inquiry into his relief from command. But all, including Colonel John Douglas, the Army's top lawyer and judge in Vietnam, denied that Herbert ever mentioned war crimes.*

; as to subparagraph (b) the words quoted were used in "Affair" (p. 79, Ex. B), but what appears to be a second paragraph in the complaint is not a paragraph but is part of the first paragraph, and the last paragraph is incomplete, the complete paragraphs reading in full:

According to Herbert, during the several months he spent at Fort Leavenworth, Kansas, after leaving Vietnam, he worked ceaselessly, spent \$8,000 of his own money, getting statements, contacting witnesses, all to buttress his war crimes case. Herbert does have several statements from officers praising him as a commander, which he used to appeal the damaging efficiency report in his record; but there is not a word relating to war crimes.

It was only after Herbert had been transferred to Fort McPherson, Georgia, where the My Lai trials were in full swing, that there is any solid indication he was thinking about reporting war crimes. *And it may well be that in bringing those charges, Herbert was as concerned with covering himself as with attacking Franklin and Barnes. Jim Wooten wrote in his Sunday New York TIMES piece on Herbert: 'He began to discuss his experience with some Army lawyers at Fort McPherson. 'They kept recommending that I'd better make sure those things I'd*

*Amended Answer of Defendant Lando*

*seen were investigated,' he said. 'It made sense to me to try to follow the book on this and clear myself.'"*

; as to subparagraph (c) the words quoted were used in "Affair" (p. 79, Ex. B) but the quotation is not a complete paragraph, as indicated in the complaint, but is only the first part of the paragraph which reads in full:

Nowhere in the entire one hundred and sixty pages of transcript of the official inquiry into Herbert's relief is there any mention by Herbert of war crimes. Why? Herbert first claimed that Army regulations prevented him from including war crime charges in his appeal. Army regulations say nothing of the kind. *Herbert then claimed he did try to raise the charges during his appeal, but was advised not to by General Joseph Russ, the presiding officer. General Russ denies this. So do the court recorder and the military lawyer assigned to Herbert's case.*

; and as to subparagraph (e) the words quoted were used in "Affair" (p. 75, Ex. B) but the quotation is not a complete paragraph, as indicated in the complaint, but is only the first part of the paragraph which reads in full:

The Army also produced an official 'fact sheet' disputing Herbert's claims point by point. According to the Army, of the twenty-one allegations made by Herbert to the CID, only seven 'had sufficient substance to warrant action or further investigation.' Of those, three had already been investigated in Vietnam and one was a case that was not under U.S. jurisdiction. *As for the remaining three incidents, including the February 14 killings, the Army claimed there was no evidence other than Herbert's own word, that he had actually reported those cases to Franklin and Barnes.*

*Amended Answer of Defendant Lando*

31) Denies each and every allegation contained in paragraph 45 except, the words quoted were used in "Affair" (p. 81, Ex. B) but the quotation that appears to follow the first quoted paragraph does not follow it, said quotation is not a complete paragraph and the complete paragraphs read in full:

What to conclude? I don't pretend to know the motives behind the behavior that has brought Herbert to national prominence. It seems plain to me that they included a desire to salvage his threatened career and to seek revenge on Colonel Franklin and General Barnes, and that to do so he exploited the issue of war crimes.

*The Army has not released the contents of its investigation into the Herbert affair. The Army is not compelled to do so. There is no recent precedent for such disclosure, though it would presumably go a long way toward clearing the air. The Army, however, may well resist publishing the information because it would include many accounts of atrocities that would further damage the Army's own reputation.*

*It is important not to let the vagaries of the Herbert affair obscure the fact that atrocities did occur before Herbert's eyes and the eyes of countless others. Indeed, the argument can be made that Herbert, whatever his distortions and inventions, is to be thanked for keeping the nation's eyes on the war crimes issue. But I am not comfortable with that argument, because it forgets the responsibility of the press. The press, which long had been negligent about dealing with the question of American war crimes, found in Herbert a heroic figure, a martyr through whom to dramatize the issue. But we bought ourselves a martyr with feet of clay.*

*Amended Answer of Defendant Lando*

32) Denies each and every allegation contained in paragraph 46 except the words quoted in subparagraphs (a), (b) and (c) appear in "Affair" (pp. 76, 73 and 77, Ex. B) as quoted; and the words quoted in subparagraph (d) appear in "Affair" (p. 76, Ex. B), but what appears to be the first quoted paragraph is not the beginning of that paragraph, and what appears to be a second quoted paragraph is in fact part of the first quoted paragraph which reads in full:

*By the time we were ready to interview Herbert (and others) for the Sixty Minutes show, the story had of course turned into something far different from the admiring profile I had thought would result. As soon as Mike Wallace's TV interview with him was filmed, Colonel Herbert turned on me, in his eyes an admirer now turned enemy, and challenged me to deny that I had originally wanted to write a book about him. I was startled; of course that was true, but I had almost forgotten it. In fact, my interest in collaborating with him had ended even before I developed doubts about his story. Herbert kept pressing the point, intimating that all along I had been engaged not in journalism, but a vendetta. Angered, I told him that if he went on in this way I would "get" him, that I had recourse to libel action. I came to regret that outburst, because subsequently Colonel Herbert was to cite this confrontation as proof that the CBS television show was a willful plot on my part to discredit him (an impossibility, since others have the last say about the content and purposes of SIXTY MINUTES) and to defile his true story.*

33) Denies that the statements referred to in paragraph 47 were false and defamatory, and denies knowledge or information sufficient to form a belief as to each and every other allegation contained in paragraph 47, except

*Amended Answer of Defendant Lando*

admits "Company" published the introduction to "Affair" in the words set forth on the first page of Exhibit B.

34) Denies knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph 50 except denies "Affair" was false and malicious and contained malicious content and intent.

AS AND FOR A FIRST COMPLETE DEFENSE TO EACH CAUSE OF ACTION

35) The complaint fails to state a cause of action upon which relief can be granted.

AS AND FOR A SECOND COMPLETE DEFENSE TO EACH CAUSE OF ACTION

36) The publications charged to be defamatory are privileged under the First and Fourteenth Amendments to the Constitution of the United States and maintenance of this action would therefore violate the rights of defendant Lando under the Constitution of the United States.

AS AND FOR A THIRD COMPLETE DEFENSE TO EACH CAUSE OF ACTION

37) The publications charged to be defamatory were based on information communicated to defendant Lando by reliable persons and from reliable sources and were believed by defendant to be true and a fair and accurate report regarding the course and conduct of public and official proceedings, published by defendant Lando in good faith without malice, and said publications are therefore privileged.

*Amended Answer of Defendant Lando*

AS AND FOR A FOURTH COMPLETE DEFENSE TO THE SECOND CAUSE OF ACTION

38) Defendant Lando was privileged as to the contents of Exhibit B because it was necessary and appropriate to defend his reputation against statements concerning him which had been made by plaintiff.

AS AND FOR A FIFTH COMPLETE DEFENSE TO THE SECOND CAUSE OF ACTION

39) Defendant Company is a Massachusetts corporation. Upon information and belief Company does not have any offices or employees in the State of New York, does not conduct and has not conducted any business in the State of New York, and has not been authorized to do so.

40) Defendant Lando is a Canadian citizen who resides in the State of Maryland. The agreement for "Affair" between defendants Company and Lando was entered into outside New York, the correspondence between defendants Company and Lando was engaged in outside New York and "Affair" was written by Lando wholly without New York State. Lando did not transact any business in New York which gave rise to the second cause of action. The Court therefore lacks in personam jurisdiction over defendant Lando.

AS AND FOR A SIXTH COMPLETE DEFENSE TO THE SECOND CAUSE OF ACTION

41) Defendant Lando repeats and realleges each and every allegation contained in paragraph 39 hereinabove.

42) Plaintiff is a citizen of and resident of the State of Georgia.

*Amended Answer of Defendant Lando*

43) Defendant Lando is a Canadian citizen and a resident of the State of Maryland.

44) Plaintiff's alleged second cause of action contained in the Complaint did not arise in the State of New York.

45) The Southern District of New York is therefore not a proper venue for this cause of action.

WHEREFORE, defendant Lando respectfully prays that this Court enter a judgment dismissing the complaint and awarding defendant Lando his reasonable costs and disbursements, together with such other and further relief as the Court may deem just and proper.

New York, New York  
March 29, 1974.

RICHARD G. GREEN  
Attorney for Defendant  
Barry Lando  
Office & P. O. Address  
1270 Avenue of the Americas  
New York, New York 10020  
Tel. No. (212) 246-8689

**Letter, Dated June 22, 1976, From Plaintiff's Counsel  
to Counsel for Wallace and CBS**

LAW OFFICES

COHN, GLICKSTEIN, LURIE, OSTRIN & LUBELL

1370 Avenue of the Americas

New York, N. Y. 10019

BY HAND

June 22, 1976

Carleton G. Eldridge, Jr., Esq.  
Coudert Brothers  
200 Park Avenue  
New York, New York 10017

Re: Herbert v. Lando, *et al.*  
74 Civ. 434 (CSH)

Dear Carl:

Pursuant to Judge Haight's request that the parties exchange their views concerning disputed areas of discovery, please be advised that the following items will be the subject of plaintiff's Rule 37 motion directed to defendants CBS and Wallace:

(1) questions about or document relating to the usual custom and practices of CBS concerning the production and presentation of "60 Minutes" segments;

(2) questions concerning conclusions formed by Wallace and/or employees of CBS as to the veracity of witnesses interviewed for or in connection with the "60 Minutes" segment on Col. Herbert;

(3) questions about or documents relating to conversations or communications between Wallace and/or employees of CBS and representatives of the Nixon White

*Letter, Dated June 22, 1976, From Plaintiff's Counsel  
to Counsel for Wallace and CBS*

House staff concerning (a) Col. Herbert, (b) CBS' coverage of the war in Vietnam, (c) CBS' coverage of war crimes, or (d) bias on the part of the Nixon Administration or White House staff against the news media in general or CBS in particular;

(4) questions concerning conversations between Wallace and representatives of the Pentagon about Col. Herbert and/or his charges as to which you have claimed journalists' privilege;

(5) questions about or documents relating to conversations or communications between Wallace and/or employees of CBS concerning Col. Herbert, his charges, and/or the truth and accuracy of the "60 Minutes" segment or any individual appearing or quoted thereon which took place after the broadcast on February 4, 1973;

(6) questions about or documents relating to expenses incurred by CBS or any agent, employee or representative thereof in preparing and presenting the "60 Minutes" segment on Col. Herbert;

(7) a document identified by Barry Lando as a CBS memorandum on the subject matter of a request from the attorney for Col. J. Ross Franklin to obtain CBS' cooperation in providing information in connection with a possible lawsuit against Col. Herbert, and questions concerning that memorandum;

(8) documents in the possession of CBS, its agents, representatives or employees, during the period from June, 1971 to February 4, 1973 regarding (a) Col. Herbert, (b) war crimes, (c) conduct of the 173rd Airborne Brigade in Vietnam, (d) individuals appearing or referred to on the "60 Minutes" segment, or (e) events set forth in *Soldier*;

*Letter, Dated June 22, 1976, From Plaintiff's Counsel  
to Counsel for Wallace and CBS*

(9) documents relating to correspondence or communications between Wallace and/or employees of CBS and (a) Gerard McCauley, plaintiff's agent, (b) James Wooten, plaintiff's co-author of *Soldier*, (c) Holt Rinehart & Winston, publisher of *Soldier*, and (d) employees or representatives of Atlantic Monthly concerning Col. Herbert, his charges, and/or the truth and accuracy of the "60 Minutes" segment or any individual appearing or quoted thereon;

(10) internal or inter-office CBS memoranda or correspondence prepared between June, 1971 and May, 1973 concerning (a) coverage of the Vietnam War and conduct of U. S. military personnel, (b) alleged anti-war bias on the part of the news media in general or CBS in particular, (c) pressure from the Nixon Administration or White House staff on the media, (d) coverage of war crimes and/or allegations concerning their concealment or cover-up;

(11) documents relating to communications between employees of CBS and employees of Holt Rinehart & Winston concerning royalty payments to plaintiff or James Wooten in connection with *Soldier*;

(12) questions about or documents relating to conversations or communications by Wallace and/or employees of CBS with or to anyone at any time, including post-litigation, concerning (a) Col. Herbert, (b) his charges, and/or (c) the truth and accuracy of the "60 Minutes" segment or any individual appearing or quoted thereon.

With regard to items numbered (3), (8), (9), (10) and (12), we note that defendants have produced documents and answered some questions pertaining to materials specifically acquired or made, or conversations held, in

*Letter, Dated June 22, 1976, From Plaintiff's Counsel  
to Counsel for Wallace and CBS*

the course of the preparation and publication of the "60 Minutes" segment. However, we believe that the existence of such documents in defendants' possession, or the facts surrounding such conversations by defendants, have a direct bearing upon defendants' intentions and upon the issue of recklessness and malice, and are thus discoverable.

With the exception of the memoranda described in (7) which CBS has declined to produce on grounds of attorney-client privilege, we know of no areas in dispute concerning communications between Wallace and/or CBS and counsel.

Many of the areas in dispute concern defendants' response to plaintiff's First Rule 34 Request. We summarized our position on your response in our letter of July 25, 1974. We have attempted to group many of those items together in this letter to avoid undue repetition; some of these matters seem particularly appropriate for resolution in advance of our conference with Judge Haight and a formal motion.

The pages from the Wallace, Hewitt & Leonard depositions which contain references to these disputed areas include the following: Wallace—132-137, 165-167, 225-228, 275-282, 327-328, 349-351; Hewitt—107-113, 124A-126, 138-139, 140-141, 147-148, 154-157; Leonard—19-22, 89-92. CBS' position that item number (7) will not be produced is set forth at pp. 977-978 of the Lando deposition.

If it is possible to arrange for an informal conference before July 6, we will be happy to sit down with you to try to resolve as many areas as possible. The most con-

*Letter, Dated June 22, 1976, From Plaintiff's Counsel  
to Counsel for Wallace and CBS*

venient dates for us for such a meeting are Friday, June 25 in the morning or after 3:00 P.M. or Friday, July 2, 1976.

Very truly yours,

COHN, GLICKSTEIN, LURIE, OSTRIN &  
LUBELL

MARY K. O'MELVENY

MKO'M:lle

cc: Honorable Charles S. Haight, Jr.

United States District Judge

U. S. Courthouse

Chambers, Room 2904

Foley Square

New York, New York 10007

Richard G. Green, Esq.

Green & Hillman

1270 Avenue of the Americas

New York, New York 10020

Charles Rembar, Esq.

Rembar, Wolf & Curtis

19 West 44th Street

New York, New York

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**Letter, Dated June 22, 1976, From Plaintiff's Counsel  
to Counsel for Defendant Lando**

LAW OFFICES

**COHN, GLICKSTEIN, LURIE, OSTRIN & LUBELL**

1370 Avenue of the Americas

New York, N. Y. 10019

*BY HAND*

June 22, 1976

Richard G. Green, Esq.  
Green & Hillman  
1270 Avenue of the Americas  
New York, New York 10020

Re: Herbert v. Lando, *et al.*  
74 Civ. 434 (CSH)

Dear Dick:

Pursuant to Judge Haight's request that the parties exchange their views concerning disputed areas of discovery, please be advised that the following items will be the subject of plaintiff's Rule 37 motion directed to defendant Barry Lando:

(1) questions concerning matters which Barry Lando proposed or discussed including in, or excluding from, the "60 Minutes" segment on Col. Herbert;

(2) questions concerning Lando's belief or intent as a basis for including in, or excluding from, the "60 Minutes" segment or the Atlantic article reference to specific matters, facts and events;

(3) questions concerning matters which Lando considered, or was interested in, mentioning on the "60 Minutes" segment;

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*Letter, Dated June 22, 1976, From Plaintiff's Counsel  
to Counsel for Defendant Lando*

(4) questions about or documents relating to (a) Lando's general custom and practices as an employee of CBS and/or the "60 Minutes" program, (b) his custom and practice in connection with the "60 Minutes" segment on Col. Herbert, and/or (c) CBS' general custom and practices in connection with "60 Minutes."

(5) questions concerning Lando's knowledge and understanding about what constituted a war crime;

(6) questions concerning Lando's opinions and conclusions concerning the truth and accuracy of persons interviewed, appearing on or referred to in connection with the "60 Minutes" segment or the Atlantic Monthly article;

(7) questions concerning conclusions reached by Lando about specific events referring or related to the "60 Minutes" segment or the Atlantic Monthly article;

(8) questions concerning the basis for Lando's conclusions regarding people or leads to be pursued, or not to be pursued, in connection with the "60 Minutes" segment and the Atlantic Monthly article;

(9) questions concerning Lando's intentions and/or state of mind about Col. Herbert;

(10) questions about or documents relating to conversations or communications between Lando and representatives of the Nixon Administration or White House staff concerning (a) Col. Herbert, (b) CBS' coverage of the war in Vietnam, (c) CBS' coverage of war crimes, or (d) bias on the part of the Nixon Administration or White House staff against the news media in general or CBS in particular;

*Letter, Dated June 22, 1976, From Plaintiff's Counsel  
to Counsel for Defendant Lando*

(11) questions about or documents relating to expenses incurred by Lando, CBS or any agent, employee or representative thereof in preparing and presenting the "60 Minutes" segment on Col. Herbert;

(12) questions concerning the document identified by Barry Lando as a CBS memorandum on the subject matter of a request to Lando from the attorney for Col. J. Ross Franklin to obtain CBS' cooperation in providing information in connection with a possible lawsuit against Col. Herbert;

(13) documents in the possession of Lando or CBS during the period from June, 1971 to May, 1973 regarding (a) Col. Herbert, (b) war crimes, (c) conduct of the 173d Airborne Brigade in Vietnam, (d) individuals appearing or referred to on the "60 Minutes" segment, or (e) events set forth in *Soldier*;

(14) documents relating to correspondence or communications between Lando and/or CBS and (a) Gerard McCauley, plaintiff's agent, (b) James Wooten, plaintiff's co-author of *Soldier*, (c) Holt Rinehart & Winston, publisher of *Soldier*, and (d) employees or representatives of Atlantic Monthly concerning Col. Herbert, his charges, and/or the truth and accuracy of the "60 Minutes" segment or any individual appearing or quoted thereon;

(15) documents and questions concerning communications between Lando and the Department of Army, Department of Defense or Central Intelligence Agency on the subject of (a) Herbert, (b) officers or enlisted men assigned to the 173d Airborne Brigade in 1968 and 1969, (c) activities of the 173d Airborne Brigade in 1968 and 1969, (d) the preparation and publication of the "60 Minutes" segment on Herbert or the Atlantic Monthly article, and (e) *Soldier*.

*Letter, Dated June 22, 1976, From Plaintiff's Counsel  
to Counsel for Defendant Lando*

(16) questions about and documents reflecting communications between Lando or CBS between June, 1971 and May, 1973 concerning (a) coverage of the Vietnam War and conduct of U. S. military personnel, (b) alleged anti-war bias on the part of the news media in general or CBS in particular, (c) pressure from the Nixon Administration or White House staff on the media, (d) coverage of war crimes and/or allegations concerning their concealment or cover-up;

(17) questions about or documents relating to conversations or communications by Lando and/or employees of CBS with or to anyone at any time, including post-litigation, concerning (a) Col. Herbert, (b) his charges, and/or (c) the truth and accuracy of the "60 Minutes" segment or any individual appearing or quoted thereon.

(18) questions concerning conversations between Lando and CBS between February 4, 1973 and May, 1973 about the Atlantic Monthly article;

(19) questions concerning conversations between Lando and anyone concerning his proposed article on Col. Herbert prior to its publication by Atlantic;

(20) questions concerning conversations between Lando and Atlantic Monthly regarding the contents of the article on Col. Herbert following its publication.

With the exception of the memoranda described in (7) which CBS has declined to produce on grounds of attorney-client privilege, we know of no areas in dispute concerning communications between Lando and/or CBS and counsel.

With regard to items numbered (10), (13), (14), (15) and (16), we note that defendant has produced documents and answered questions pertaining to materials or conversations specifically acquired, made for or held in the course of the preparation or publication of the "60

*Letter, Dated June 22, 1976, From Plaintiff's Counsel  
to Counsel for Defendant Lando*

Minutes" segment or the Atlantic Monthly article. However, we believe that existence of such documents in defendant's possession or facts of such conversations by defendant have a direct bearing upon defendant's intentions and upon the issue of recklessness and malice and are thus discoverable.

Many of the areas in dispute concern defendant's response to plaintiff's First Rule 34 Request. We summarized our position on your response in our letter of July 23, 1974. We have attempted to group many of those items together in this letter to avoid undue repetition; some of these matters seem particularly appropriate for resolution in advance of our conference with Judge Haight and a formal motion.

The directions to Lando not to answer questions in these various areas appear at the following transcript pages of the Lando deposition: 173-177, 418-422, 503-506, 522-528, 579-580, 586-587, 666-668, 773-774, 807, 840-842, 876-882, 921-922, *cf.* 977-978, 1094-1098, 1138-1139, 1147-1149, 1331-1332, 1452, 1485-1491, 1524-1526, 1526-1531, 1554-1555, 1567-1571, 1610-1611, 1618, 1629-1630, 1716-1717, 1741-1746, 1747-1748, 1753-1757, 1789-1791, 1791-1792, 1841-1842, 1872-1882, 1890-1892, 1900-1901, 1905-1908, 1909-1911, 1925-1926, 1943-1946, 1953-1955, 2013-2015, 2021-2029, 2063-2064, 2071-2072, 2085-2086, 2112, 2158, 2175-2176, 2178-2180, 2182-2183, 2286-2287, 2301-2304, 2311-2313, 2341-2342A, 2391-2393, 2453-2454, 2480, 2505-2506, 2556-2558, 2570-2573, 2577-2579, 2583-2586, 2594, 2658-2660, 2685 and 2694.

If it is possible to arrange for an informal conference before July 6, we will be happy to sit down with you to try to resolve as any many areas as possible. The most

*Letter, Dated June 22, 1976, From Plaintiff's Counsel  
to Counsel for Defendant Lando*

convenient dates for us for such a meeting are Friday, June 25 in the morning or after 3:00 P.M. or Friday, July 2, 1976.

Very truly yours,

COHN, GLICKSTEIN, LURIE, OSTRIN  
& LUBELL

MARY K. O'MELVENY

MKO'M:lle

cc: Honorable Charles S. Haight, Jr.

United States District Judge

U. S. Courthouse

Chambers, Room 2904

Foley Square

New York, New York 10007

Carleton G. Eldridge, Jr., Esq.

Coudert Brothers

200 Park Avenue

New York, New York 10017

Charles Rembar, Esq.

Rembar, Wolf & Curtis

19 West 44th Street

New York, New York

**Letter, Dated July 1, 1976, From Counsel for Defendants Wallace and CBS to Plaintiff's Counsel**

COUDERT BROTHERS

ATTORNEYS AND COUNSELLORS AT LAW

200 Park Avenue

New York, N. Y. 10017

July 1, 1976

Mary K. O'Melveny, Esq.  
Cohn, Glickstein, Lurie,  
Ostrin & Lubell  
1370 Avenue of the Americas  
New York, New York 10019

Re: Herbert v. CBS, *et al.*  
74 Civ. 434 (CSH)

Dear Mary:

In response to your letter of June 22, 1976 outlining the areas of discovery with respect to which plaintiff is pursuing Rule 37 relief, I am writing on behalf of defendants Mike Wallace and CBS to set forth the following views:

While each of the twelve numbered paragraphs in your letter identify your characterization of disputed areas in discovery and while you also list generally the contested questions upon oral examination of Messrs. Leonard, Hewitt and Wallace, you have not identified under each of your categories the specific questions which drew objections. Upon our review of the transcripts, we have made an attempt to isolate the questions which may relate in substance to those categories. The text of each objectionable question is set forth with corresponding transcript page and line reference under each of your numbered categories in the memorandum accompanying this letter. Here, we draw your attention to your numbered areas of dispute, the page and line reference to

*Letter, Dated July 1, 1976, From Counsel for Defendants Wallace and CBS to Plaintiff's Counsel*

questions which drew an objection and our stated grounds for objection to questions and, where necessary, to your requests for production of documents.

**PLAINTIFF'S PARAGRAPH (1):** "Questions about or documents relating to the usual custom and practices of CBS concerning the production and presentation of '60 Minutes' segments."

**HEWITT:**

Page 124(a), line 18

Page 140, line 8

Page 140, line 23

Page 141, line 7

Page 141, line 17

**LEONARD:** No questions.

**WALLACE:**

Page 279, line 15.

**BASIS OF OBJECTION:** Defendants Mike Wallace and CBS object to the questions listed above on the grounds and that information relating to general CBS policies are entirely irrelevant to the issues raised by the pleadings and therefore are not likely to lead to the discovery of admissible evidence. Whether CBS had any policy, whether investigative reporters adhered to or departed from some policy, whether CBS was in the practice of conducting a dozen filmed interviews or one filmed interview of the same person, are all questions which have no bearing upon any issue raised by the pleadings. There is no dispute but that in this case, plaintiff's libel claim is governed by *New York Times v. Sullivan* and its progeny. Accordingly, it is settled that the dispositive issues turn upon plaintiff's clear and convincing proof of falsity and knowledge of falsity of *reported*

*Letter, Dated July 1, 1976, From Counsel for Defendants  
Wallace and CBS to Plaintiff's Counsel*

*fact.* None of those questions listed above are calculated to lead to the discovery of admissible evidence on those issues.

**PLAINTIFF'S PARAGRAPH (2):** "Questions concerning conclusions formed by Wallace and/or employees of CBS as to the veracity of witnesses interviewed for or in connection with the '60 Minutes' segment on Colonel Herbert."

**LEONARD:** No questions.

**WALLACE:** No questions.

**HEWITT:**

Page 151, line 24.

**BASIS OF OBJECTION:** The primary basis of the objection to the question appearing at page 151, line 24 of the Hewitt deposition is that, inasmuch as Mr. Hewitt had not testified to knowledge and, in fact, did not know the identity of specific individuals interviewed who were at the "POW compound in Vietnam", the question is lacking in foundation and, in its form is impossible to answer.

As an additional ground, defendant CBS contends that in no event is this category of question relevant to the issues raised by the pleadings; or likely to lead to the discovery of admissible evidence. For elaboration, your attention is directed to our view of the application of the *Sullivan* rule as the basis of the objection to those questions set forth above in connection with your paragraph (1).

**PLAINTIFF'S PARAGRAPH (3):** "Questions about or documents relating to conversations or communications between Wallace and/or employees of CBS and representatives of the Nixon White House Staff concerning (a) Colonel Herbert, (b) CBS' coverage of the war in Vietnam, (c) CBS' coverage of war crimes, or (d) bias

*Letter, Dated July 1, 1976, From Counsel for Defendants  
Wallace and CBS to Plaintiff's Counsel*

on the part of the Nixon Administration or White House staff against the news media in general or CBS in particular."

**LEONARD:**

Pages 87-89

**WALLACE:**

Pages 132, line 3 through 133, line 19

**HEWITT:**

Colloquy between counsel at pages 154,  
lines 23 through 156, line 6

**BASIS OF OBJECTION:** Upon our review of relevant transcripts, we find that no question relating to paragraph 3(a) drew an objection which resulted in a direction not to answer. With respect to paragraph 3(b), 3(c) and 3(d) defendants Mike Wallace and CBS object on the grounds that under no theory can it be argued that questions relating generally to CBS' coverage of the war in Vietnam, CBS' coverage of war crimes or bias on the part of the Nixon Administration or White House staff against the news media in general or CBS in particular can yield any evidence relevant to said requisite proof of falsity and knowledge of falsity of any material fact included in either the CBS broadcast or any material fact in the voluminous file of documents produced by defendants in this case.

**PLAINTIFF'S PARAGRAPH (4):** "Questions concerning conversations between Wallace and representatives of the Pentagon about Col. Herbert and/or his charges as to which you have claimed journalist's privilege";

**LEONARD:** No questions.

**HEWITT:** No questions.

*Letter, Dated July 1, 1976, From Counsel for Defendants  
Wallace and CBS to Plaintiff's Counsel*

**WALLACE:**

Page 226, line 5.

This is a claim of a journalists's privilege under Civil Rights Law Sec. 79-h and under the First Amendment to the United States Constitution as well as under Article I, Section 8 of the New York State Constitution.

**PLAINTIFF'S PARAGRAPH (5):** "Questions about or documents relating to conversations or communications between Wallace and/or employees of CBS concerning Col. Herbert, his charges, and/or the truth and accuracy of the '60 Minutes' segment or any individual appearing or quoted thereon which took place after the broadcast on February 4, 1973."

**LEONARD:** No questions.

**HEWITT:** No questions.

**WALLACE:** No questions.

**BASIS OF OBJECTION TO PRODUCTION OF DOCUMENTS:** All documents in the possession of Mike Wallace and/or CBS which were acquired or generated in connection with the research, preparation and broadcast of "Selling" have been produced. To the extent this production request seeks documents which may have been generated or acquired by Mike Wallace and/or CBS subsequent to the date of the broadcast, defendants object to production on the grounds that the First Amendment Constitutional Privilege limits relevant inquiry to facts known to the persons responsible for the publication at the time of the broadcast. Such documents as may have been acquired or generated after the broadcast are irrelevant to the fact known at the time of the broadcast and therefore cannot lead to the discovery of admissible evidence. Without waiving the objection, we advise that, apart from documents requested

*Letter, Dated July 1, 1976, From Counsel for Defendants  
Wallace and CBS to Plaintiff's Counsel*

by counsel or acquired by counsel, defendants are not aware at this time of any additional documents relevant to the request set forth in plaintiff's paragraph (5).

**PLAINTIFF'S PARAGRAPH (6):** "Questions about or documents relating to expenses incurred by CBS or any agent, employee or representative thereof in preparing and presenting the '60 Minutes' segment on Col. Herbert";

**LEONARD:**

Page 22, line 4

**HEWITT:**

Page 138, line 6

Page 156, line 9—25 (relevant colloquy of counsel)

**WALLACE:** No questions.

**BASIS OF OBJECTION TO QUESTION AND TO PRODUCTION OF DOCUMENTS:** No documents reflecting the expenses incurred by defendants Mike Wallace and CBS in connection with the research, preparation and broadcast of "Selling" have been produced since it is the defendants' position that such requests and questions pertinent thereto are wholly irrelevant to the issues involved in the present litigation, are not calculated to lead to the discovery of admissible evidence and that they are burdensome and oppressive, particularly since—as stated by Mr. Hewitt during his deposition—such materials are not retained and filed by particular program segment such as "Selling" (pp. 137-8).

**PLAINTIFF'S PARAGRAPH (7):** "A document identified by Barry Lando as a CBS memorandum on the subject matter of a request from the attorney for Col. J. Ross Franklin to obtain CBS' cooperation in providing information in connection with a possible lawsuit against Col. Herbert, and questions concerning that memorandum";

*Letter, Dated July 1, 1976, From Counsel for Defendants  
Wallace and CBS to Plaintiff's Counsel*

HEWITT:

Page 109, line 18.

LEONARD: No questions.

WALLACE: No questions.

**BASIS OF OBJECTIONS:** The document in question has not been produced by defendant CBS because the contents thereof reflect advice from attorney to client. The question listed above is objectionable on the grounds that the answer to the question as framed, calls for testimony about confidential communications between attorney and client.

**PLAINTIFF'S PARAGRAPH (8):** "Documents in the possession of CBS, its agents, representatives or employees, during the period from June, 1971 to February 4, 1973 regarding (a) Col. Herbert, (b) war crimes, (c) conduct of the 173d Airborne Brigade in Vietnam, (d) individuals appearing or referred to on the '60 Minutes' segment, or (e) events set forth in *Soldier*;"

See objection made in response to plaintiff's paragraph (5).

**PLAINTIFF'S PARAGRAPH (9):** "Documents relating to correspondent or communications between Wallace and/or employees of CBS and (a) Gerard McCauley, plaintiff's agent, (b) James Wooten, plaintiff's co-author of *Soldier*, (c) Holt Rinehart & Winston, publisher of *Soldier*, and (d) employees or representatives of Atlantic Monthly concerning Col. Herbert, his charges, and/or the truth and accuracy of the '60 Minutes' segment or any individual appearing or quoted thereon;"

All documents in the possession of Mike Wallace and/or CBS which were acquired or generated in connection with the research, preparation and broadcast of "Selling" have been produced.

*Letter, Dated July 1, 1976, From Counsel for Defendants  
Wallace and CBS to Plaintiff's Counsel*

**PLAINTIFF'S PARAGRAPH (10):** "Internal or inter-office CBS memoranda or correspondence prepared between June, 1971 and May, 1973 concerning (a) coverage of the Vietnam War and conduct of U. S. military personnel, (b) alleged anti-war bias on the part of the news media in general or CBS in particular, (c) pressure from the Nixon Administration or White House staff on the media, (d) coverage of war crimes and/or allegations concerning their concealment or cover-up";

**BASIS OF OBJECTION:** All documents in the possession of Mike Wallace and CBS acquired or prepared in connection with the research, preparation and broadcast of "Selling" have been produced. To the extent plaintiff's request goes beyond those documents, defendants have objected to production and continue to object on the grounds that, even if such documents did exist, they are irrelevant to the activities of CBS employees involved in the production and broadcast of "selling", are irrelevant to the publications sued upon in this action and therefore are not likely to lead to the discovery of admissible evidence.

**PLAINTIFF'S PARAGRAPH (11):** "Documents relating to communications between employees of CBS and employees of Holt Rinehart & Winston concerning royalty payments to plaintiff or James Wooten in connection with *Soldier*;"

**BASIS OF OBJECTION:** Defendant CBS will produce correspondence, memoranda and telephone logs, if any exist, relating to or concerning the payments of royalties or advances against royalties; but to the extent that plaintiff requests other documents, particularly those relating to accounting procedures and royalty statements, defendant objects on the grounds that such documents are irrelevant to the issues involved in the present litigation and not likely to lead to the discovery of admis-

**PLAINTIFF'S PARAGRAPH (12):** "Questions about or documents relating to conversation or communications by Wallace and/or employees of CBS with or to anyone at any time, including post-litigation, concerning (a) Col. Herbert, (b) his charges, and/or (c) the truth and accuracy of the '60 Minutes' segment or any individual appearing or quoted thereon."

Page 147, line 3  
Page 147, line 25  
Page 148, line 8

Page 166, line 4 ) Objection withdrawn. Wallace  
                      ) will fill in the answers prior  
Page 166, line 10) to execution of the transcript.

*BASIS OF OBJECTION TO QUESTIONS AND PRODUCTION OF DOCUMENTS:* First, the question put to Mr. Hewitt drew objection because the interrogator failed to identify the specific conversations he had in mind after 147 or 148 pages of testimony had been given by the witness. Furthermore, the witness was not permitted to review all of the prior testimony relevant thereto. With respect to the category and the request for production of documents post-broadcast and post-litigation, defendants object on the grounds that such

The foregoing constitutes the summarization of the views of defendants Mike Wallace and CBS concerning the disputed areas of discovery outlined in your letter of June 22, 1976. We trust that it will aid in advancing your understanding of defendants' position with respect to specific objections and look forward to discussing these matters further during our July 2, 1976 meeting.

Attorneys for Defendants Mike Wallace  
and CBS Inc.

cc: Hon. Charles S. Haight, Jr.  
W. Mallory Rintoul, Esq.  
Richard G. Green, Esq.  
Charles Rembar, Esq.

**Letter, Dated July 1, 1976, From Counsel for Defendant  
Lando to Plaintiff's Counsel**

GREEN & HILLMAN

LAWYERS

1270 Avenue of the Americas

New York, N. Y. 10020

Circle 6-8689

BY HAND

July 1, 1976

Ms. Mary K. O'Melveny  
Cohn, Glickstein, Lurie, Ostrin & Lubell  
1370 Avenue of the Americas  
New York, New York 10019

Re: *Herbert v. Lando et al*

Dear Mary:

We refer to your letter of June 22, 1976 and to Judge Haight's request that the parties exchange their views concerning disputed areas of plaintiff's discovery.

While you enumerated in your letter disputed discovery items which plaintiff intends to pursue in his proposed Rule 37 motion, plaintiff has not designated the questions which fall into those areas, nor are any reasons stated why discovery should be allowed on those areas. Trying to work from page references on page 4 of your letter, we are unable to discern which questions fall into which category. It is also impracticable to attempt to fit most questions within a single category inasmuch as most were objected to for more than one reason. Furthermore we find that many of the questions on page 4 of your letter do not fit into any of the categories you list.

*Letter, Dated July 1, 1976, From Counsel for Defendant  
Lando to Plaintiff's Counsel*

Finally, although your letter groups together your demands for document production with disputes arising out of the deposition of Barry Lando, for clarity's sake we have separated our comments on document production from those on deposition questions.

With regard to the testimony of Barry Lando, many of the questions which we objected to and directed the witness not to answer were questions that had been previously asked and answered, rephrased after an objection was raised and answered in rephrased form, argumentative or rhetorical, or were questions which had no foundation or required the witness to characterize documents which had already been marked for identification. Oftentimes more than one of these grounds led to our objections and direction not to answer. Our remaining objections were made either because the questions were not relevant to any issue in this case and were not reasonably calculated to lead to the discovery of admissible evidence, or they were subject to a privilege (attorney-client, work product or materials prepared in anticipation of litigation or for trial).

Plaintiff has had 26 deposition sessions with Barry Lando, which produced nearly 3000 pages of transcript, with 240 exhibits. There has been extensive testimony by Barry Lando as to whom he interviewed, his discussions with interviewees and all forms and frequency of communications with them. Plaintiff has had full discovery as to the facts known to Barry Lando in the preparation and production of the 60 MINUTES segment "THE SELLING OF ANTHONY HERBERT" and the article "THE HERBERT AFFAIR." Plaintiff has also conducted nine other deposition sessions in connection with the discovery of defendants Atlantic Monthly Company, Mike Wallace and CBS, Inc.

*Letter, Dated July 1, 1976, From Counsel for Defendant  
Lando to Plaintiff's Counsel*

Many of the questions to which we have raised objections concern subjective matters calling for inquiry into the witness' credibility evaluation of other witnesses' fact assertions, his beliefs, his intent, the editorial basis for including or excluding material, his conclusions and opinions and the basis for same. These questions do not seek to elicit facts but rather inferences to be drawn from the witness' testimony. Such questions are not a proper subject for discovery.

Regarding your demand for document production, as Barry Lando's response to your first request for the production of documents indicated would be done, he has produced all documents in his possession, custody or control which were prepared for or in the course of the preparation,\* production and broadcast of the 60 MINUTES segment, "THE SELLING OF ANTHONY HERBERT", and all documents prepared for or in the course of the preparation and publication of the article "THE HERBERT AFFAIR." All other documents requested relate to such areas as Lando's general custom and practices as an employee of CBS (item 4), or to conversations or communications between Lando and representatives of the Nixon Administration or White House staff concerning CBS coverage of the Vietnam war, war crimes or bias on the part of the White House staff against news media in general or CBS in particular (your item 10). As to these areas, we do not see how such discovery is relevant

\*Documents relating to expenditures incurred by Barry Lando during the course of the preparation of the 60 MINUTES segment "THE SELLING OF ANTHONY HERBERT" have been and will continue to be objected to on the grounds that such documents are not relevant to any issue in this action and are neither admissible nor reasonably calculated to lead to the discovery of admissible evidence, and such a document request is burdensome and oppressive.

*Letter, Dated July 1, 1976, From Counsel for Defendant  
Lando to Plaintiff's Counsel*

to any issue in this action, admissible or reasonably calculated to lead to the discovery of admissible evidence.

Post-litigation documents—item 17 in your letter—are clearly objectionable on the basis of privilege in that any such documents were prepared in defense of litigation or as attorney's work product.

We look forward to meeting with you on July 2nd at 9:30 A.M. in the hope of resolving some of these matters before our conference with Judge Haight on July 6th.

Very truly yours,

GREEN & HILLMAN

By RICHARD GREENE

cc: Honorable Charles S. Haight, Jr.

United States District Judge

U.S. Courthouse

Chambers, Room 2904

Foley Square

New York, N.Y. 10007

Carleton G. Eldridge, Jr., Esq.

Coudert Brothers

200 Park Avenue

New York, New York 10017

Charles Rembar, Esq.

Rembar, Wolf & Curtis

19 West 44th Street

New York, New York 10036

bc: W. Mallory Rintoul, Esq.

150a

**Letter, Dated July 16, 1976, From Plaintiff's Counsel  
to Counsel for Defendant Lando**

LAW OFFICES

COHN, GLICKSTEIN, LURIE, OSTRIN & LUBELL

1370 Avenue of the Ame s

New York, N. Y. 10019

July 16, 1976

Richard G. Green, Esq.  
Green & Hillman  
1270 Avenue of the Americas  
New York, New York 10020

Re: Herbert v. Lando, et al.  
74 Civ. 434 (CSH)

Dear Dick:

We have reviewed the open questions which Barry Lando was directed not to answer at his deposition. As we indicated to you at our last conference, we are setting forth below those open questions which we will not pursue in connection with plaintiff's Rule 37 motion.

Our elimination of the questions listed below is not intended as any agreement on our part with the direction to Mr. Lando not to answer those questions. Rather, this list represents our attempt to reduce the areas of dispute between us and our recognition that some of the questions were substantially answered during the deposition and other questions were answered before objection was made.

The questions which we propose to eliminate and which were referred to in our letter of June 22, 1976, appear at the following transcript pages of the Lando deposition: 418-422, 503-506, 807, 840-842, 921-922, 1094-1098, 1147-1149, 1452, 1567-1571, 1610-1611, 1629-1630, 1741-1746, 1841-1842,

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*Letter, Dated July 16, 1976, From Plaintiff's Counsel to  
Counsel for Defendant Lando*

1909-1911, 1943-1946, 2021-2029, 2063-2064, 2071-2072, 2112, 2158, 2175-2176, 2178-2180, 2182-2183, 2341-2342, 2391-2393, 2480, 2505-2506, 2577, 2594, 2658-2660, 2694.

We trust that you have also given serious reconsideration to your position on the open questions which remain. We are hoping to receive a revised list from you indicating a further reduction of the issues to be raised before Judge Haight on July 21, 1976.

Very truly yours,

COHN, GLICKSTEIN, LURIE, OSTRIN &  
LUBELL

Jonathan W. Lubell

JWL:mf

BY HAND

cc: Hon. Charles S. Haight, Jr.  
United States District Judge  
U. S. Courthouse  
Chambers, Room 2904  
Foley Square  
New York, N.Y. 10007

Carleton G. Eldridge, Jr., Esq.  
Coudert Brothers  
200 Park Avenue  
New York, New York 10017

Charles Rembar, Esq  
Rembar, Wolf & Curtis  
19 West 44th Street  
New York, New York

**Letter, Dated July 19, 1976, From Plaintiff's Counsel to  
Counsel for Defendants Wallace and CBS**

LAW OFFICES

COHN, GLICKSTEIN, LURIE, OSTRIN & LUBELL

1370 Avenue of the Americas

New York, N. Y. 10019

July 19, 1976

Carleton G. Eldridge, Jr., Esq.  
Coudert Brothers  
200 Park Avenue  
New York, New York 10017

Re: Herbert v. Lando, et al.—74 Civ. 434 (CSH)

Dear Carl:

We set forth below any changes or modifications of plaintiff's position as previously described in the correspondence between us on questions that defendants Mike Wallace and CBS (Hewitt and Leonard) were directed not to answer and on certain Rule 34 document requests to which the said defendants Wallace and CBS objected. In arriving at our current position, we have considered our discussion of July 2 and 6, 1976, and your comments. We will generally follow the form of your July 1, 1976 letter.

Preliminarily, we note that our position on the open questions and demands rests upon the rules of law governing the nature of the evidence admissible in a libel case. As the Court of Appeals for this Circuit stated in *Goldwater v. Ginzburg*, 414 F. 2d 324, 342 (2nd Cir. 1969):

"There is no doubt that evidence of negligence, of motive and of intent may be adduced for the purpose of establishing, by cumulation and by appropriate inferences, the fact of a defendant's recklessness or of his knowledge of falsity."

*Letter, Dated July 19, 1976, From Plaintiff's Counsel to  
Counsel for Defendants Wallace and CBS*

**PLAINTIFF'S PARAGRAPH (1):** "Questions about or documents relating to the usual custom and practices of CBS concerning the production and presentation of '60 Minutes' segments."

**WALLACE:**

P. 279, l. 15 Plaintiff withdraws this question

**PLAINTIFF'S PARAGRAPH (5):** "Questions about or documents relating to conversations or communications between Wallace and/or employees of CBS concerning Col. Herbert, his charges, and/or the truth and accuracy of the '60 Minutes' segment or any individual appearing or quoted thereon which took place after the broadcast on February 4, 1973."

There are no questions under this paragraph which CBS's representatives or Wallace were directed not to answer. You have advised us that apart from documents requested by counsel or acquired by counsel, defendants are not aware of any additional documents relevant to the request. In light of this advice, plaintiff will not further press this particular request.

**PLAINTIFF'S PARAGRAPH (7):** "A document identified by Barry Lando as a CBS memorandum on the subject matter of a request from the attorney for Col. J. Ross Franklin to obtain CBS' cooperation in providing information in connection with a possible lawsuit against Col. Herbert, and questions concerning that memorandum."

**HEWITT:**

P. 109-113. You indicated to us that you would advise us of the list of addressees to whom the subject memorandum was circulated. We will request the Court to conduct an *in camera* inspection of the memorandum. If the memorandum is thereafter produced, we will have certain questions to ask. You have indicated you will bring the memorandum with you to Court on July 21, 1976.

*Letter, Dated July 19, 1976, From Plaintiff's Counsel to Counsel for Defendants Wallace and CBS*

**PLAINTIFF'S PARAGRAPH (8):** "Documents in the possession of CBS, its agents, representatives or employees, during the period from June, 1971 to February 4, 1973 regarding (a) Col. Herbert, (b) war crimes, (c) conduct of the 173d Airborne Brigade in Vietnam, (d) individuals appearing or referred to on the '60 Minutes' segment, or (e) events set forth in *Soldier*."

You have advised us that you have produced all documents in the possession of Mike Wallace and CBS gathered or generated during the research, preparation and broadcast of the '60 Minutes' segment on Col. Herbert relevant to the matters set forth in Paragraph 8. At our conference you further advised us that CBS and Wallace had produced all documents in CBS' possession that Wallace and Lando knew of at the time the program was being researched, prepared and broadcast relevant to the matters set forth in paragraph 8. We will continue to seek the production of all documents in the possession of CBS, its agents, representatives or employees during the period from June 1, 1971 to February 4, 1973, regarding Col. Herbert, the 173d Airborne Brigade while in Vietnam, individuals appearing or referred to on the '60 Minutes' segment and events described in *Soldier*. In this connection, we are willing to restrict the document requests to documents in the possession of CBS News, as distinguished from the entire CBS corporate entity.

**PLAINTIFF'S PARAGRAPH (9):** "Documents relating to correspondence or communications between Wallace and/or employees of CBS and (a) Gerald McCauley, plaintiff's agent, (b) James Wooten, plaintiff's co-author of *Soldier*, (c) Holt Rinehart & Winston, publisher of *Soldier*, and (d) employees or representatives of Atlantic Monthly concerning Col. Herbert, his charges, and/or the truth and accuracy of the '60 Minutes' segment or any individual appearing or quoted thereon."

*Letter, Dated July 19, 1976, From Plaintiff's Counsel to Counsel for Defendants Wallace and CBS*

Similar to plaintiff's paragraph 8, you have advised us that all documents in the possession of Mike Wallace and/or CBS which were acquired or generated in connection with the research, preparation and broadcast of the '60 Minutes' segment relevant to the matters set forth in paragraph 9 have been produced. Included in such documents, you have further advised us, are all documents prepared and were known to Wallace and Lando at that time. We will continue to seek the production of any other documents which were in the possession of Mike Wallace and/or CBS during the time the program was being prepared and which are relevant to the matters set forth in paragraph 9, whether or not Wallace or Lando had specific knowledge of such documents at that time.

**PLAINTIFF'S PARAGRAPH (11):** "Documents relating to communications between employees of CBS and employees of Holt Rinehart & Winston concerning royalty payments to plaintiff or James Wooten in connection with *Soldier*."

You have advised us that CBS will produce correspondence, memoranda and telephone logs, if any exist, relating to or concerning the payment of royalties or advances. With the completion of this matter, we will not further pursue the request for other documents under this paragraph.

In connection with areas concerning communications, etc. between the White House Staff and CBS officials concerning CBS' presentation of news of the Vietnam war and war crimes, we note that facts have come to light over the last three years about substantial pressure on CBS, as well as other media, to present a certain particular viewpoint on those issues. According to former White House officials and other sources familiar with activities during

*Letter, Dated July 19, 1976, From Plaintiff's Counsel to  
Counsel for Defendants Wallace and CBS*

the Presidency of Richard M. Nixon, such pressure occurred in specific conversations with CBS officials, involved those particular subjects and resulted in programming changes. We believe such information is relevant to the motive of CBS in presenting the segment on Colonel Herbert—with its distortions and deliberate exclusion of material facts.

We hope that you will reconsider the position of Wallace and CBS and be able to further narrow the areas of dispute.

Very truly yours,

COHN, GLICKSTEIN, LURIE, OSTRIN  
& LUBELL

s/ Johathan W. Lubell

JWL:mf  
BY HAND

cc: Honorable Charles S. Haight, Jr.  
United States District Judge  
U. S. Courthouse  
Chambers, Room 2904  
Foley Square  
New York, N.Y. 10007 BY HAND

Richard G. Green, Esq.  
Green & Hillman  
1270 Avenue of the Americas  
New York, New York 10020

Charles Rembar, Esq.  
Rembar, Wolf & Curtis  
19 West 44th St.  
New York, New York

**Transcript of Proceedings Before Hon. Charles S.  
Haight, Jr., Dated July 21, 1976**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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ANTHONY HERBERT,

*Plaintiff,*

*vs.*

BARRY LANDO, MIKE WALLACE, COLUMBIA BROADCASTING SYSTEM, Inc., and ATLANTIC MONTHLY COMPANY,

*Defendants.*

74 Civ. 434

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Before:

HON. CHARLES S. HAIGHT, JR.,  
District Judge.

New York, July 21, 1976;  
9.30 o'clock a.m.

APPEARANCES:

COHEN, GLICKSTEIN, LURIE, OSTRIN & LUBELL, Esqs., Attorneys for Plaintiff, 1370 Avenue of the Americas, New York, N. Y., BY: DAVID J. LUBELL, Esq., and MS. MARY K. O'MELVENY, Of Counsel.

GREEN & HILLMAN, Esqs., Attorneys for Defendant Lando, 1270 Avenue of the Americas, New York, N. Y., BY: RICHARD G. GREEN, Esq., Of Counsel.

*Transcript of Proceedings Before Hon. Charles S.  
Haight, Jr., Dated July 21, 1976*

(2) COUDERT BROS., Esqs., Attorneys for Defendant Wallace, 200 Park Avenue, New York, N. Y., BY: E. G. ELDRIDGE, JR., Esq., and PAUL JONES, Esq., Of Counsel.

W. MALLORY RINTOUL, Esq., Attorney for Defendant, Columbia, 51 West 52nd Street, New York, N. Y.

REMBAR, WOLF & CURTIS, Esqs., Attorneys for Defendant, Atlantic, 19 West 44th Street, New York, N. Y., BY: FRANK CURTIS, Esq., Of Counsel.

(3) (Case called.)

MR. LUBELL: Plaintiff is ready.

THE CLERK: All sides are ready, your Honor.

THE COURT: All right.

Now, ladies and gentlemen, we have a limited amount of time available to us today, because I have to resume a jury trial at about 10:15, but it seemed to me it might be useful to have this session today and perhaps work out some guidelines, or at least I can receive some further guidance from you.

I have read the exchange of correspondence among counsel on disputed discovery matters, and it seemed to me that was a helpful exercise.

Let me just indicate some of the questions and areas of concern that I have, in no particular order, and we can talk about them, and this hearing today may give rise to rulings on certain general areas of discovery.

I may also indicate the necessary for further briefs or authorities.

Let me start with the general area of privilege.

As I understand the papers, there are two claims of privilege that are made. The first relates (4) to the journalist's privilege, as contained in the New York civil rights statute, and I gather that in that context Mr. Wallace resists answering questions about some of his discussions and contacts with people at the Pentagon; is that so?

*Transcript of Proceedings Before Hon. Charles S.  
Haight, Jr., Dated July 21, 1976*

MR. LUBELL: Yes, your Honor.

THE COURT: All right. The difficulty I have with the New York civil rights statute is that it appears to address the question of whether someone who refuses to answer can be punished by contempt, either by the Court or in connection with a grand jury indictment.

The purpose of that statute as to what is presented here troubles me somewhat. If I conclude that the particular question or questions that we are concerned with are proper subjects of pretrial discovery and direct Mr. Wallace to answer and he does not do so, there is no question of contempt that necessarily arises. I can simply strike the defendant's answer for failure to comply with the discovery order. There is no contempt proceeding. No one goes to prison. Some money may change hands shortly thereafter, but I have a little difficulty understanding the applicability of the New York no-contempt proceeding statute to this particular case. Can someone enlighten me on that?

(5) Who appears for Mr. Wallace?

MR. ELDRIDGE: I do, sir. I am Mr. Eldridge.

THE COURT: All right, Mr. Eldridge.

MR. ELDRIDGE: Well, basically, Judge, historically speaking, my understanding of the statute was that in cases prior to the legislative enactment the Court, when a reporter on a constitutional basis, felt that he did not have to disclose the source from whence he obtained certain information in his news gathering activity, normally in various jurisdictions there have been cases which went one way or the other depending on the particular case.

For example, in criminal cases the privilege has been struck down more frequently than in civil cases, with the balance of society's need for the information in mind, as I would presume.

*Transcript of Proceedings Before Hon. Charles S.  
Haight, Jr., Dated July 21, 1976*

In the case where a reporter in a civil case has failed to respond and the Court felt a response was indicated and so directed, the reporter was customarily given time to consider what position he would take now in face of a Court directive. If he responded in the negative, as Torre did at one time, why, then, the Court exercised its contempt powers and directed either a fine or incarceration, subject to the witness responding to (6) the question.

THE COURT: Now, Torre was a libel case, was it not?

MR. ELDRIDGE: Yes, your Honor.

THE COURT: Was Miss Torre a party or a defendant in that case?

MR. ELDRIDGE: No. She was a witness.

THE COURT: Well, isn't that a significant difference in this case? Mr. Wallace is a party defendant. If—

MR. ELDRIDGE: I was just getting into the historical background. I mentioned Torre as an example that occurred in this court.

Beginning with the basis of the background, the legislators in their wisdom felt if a contempt in this question of privilege was not a desirable result in terms of First Amendment freedoms the result was that they took away a judicial power. Now, they do not, and I think you are correct, take away any powers that the Court would otherwise have. That is the basis of our raising the question of privilege.

When we do, we base it on our First Amendment constitutional rights, which in our judgment may be broader than the statute in its narrow legislative accomplishment. (7) That is the historical concept of my understanding of the New York statute.

THE COURT: Well, to evaluate the First Amendment constitutional right problem, I suppose I am required to enter into a balancing process. That is what the cases indicate to me from my first examination of them. On the

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one hand, the availability of this information, or this material, is relevant, to the plaintiff through other sources; on the other hand, the purpose of preserving the reporter's confidentiality.

I think that on the question of privilege I am going to require briefs from counsel. I understand the positions. That appears from the letter. But I would appreciate memoranda of law on the confidentiality question, based upon the New York statute or the Federal statute or anything else, in respect to those questions, where Mr. Wallace declines to answer on the basis of privilege.

MR. ELDRIDGE: There is only one.

MR. GREEN: There is only one question.

THE COURT: Only one question?

MR. LUBELL: That is right.

THE COURT: Well, it could lead—

MR. LUBELL: We were cut off in the course of (8) the examination, and we weren't going to make a lot of objections.

MR. ELDRIDGE: It is a question of the sources of information, Judge.

THE COURT: It is in the Wallace deposition, that particular question, isn't it? Which page is that?

MS. O'MELVENY: Page 226.

THE COURT: Yes. The question appears to be:

"Q. Could you identify to us who the Pentagon people were who speculated that the reason the Generals didn't want to talk was because of so many true stories of war crimes?"

That is the question at issue, tied up with the question of privilege, the journalist's First Amendment right.

All right. I would appreciate memoranda of law directed to the privilege question that arises out of that question.

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Now, on the attorney-client privilege, I am a little puzzled by that claim of privilege as it relates to the Col. Franklin memorandum. I may not fully understand what is going on there, but, as I understand it, there is in existence a memorandum referring to some of (9) Col. Franklin's communications looking towards possible joining in litigation with CBS.

What I don't understand is which attorney is involved in the attorney-client privilege that is asserted in connection with that memorandum and which client. Can someone enlighten me on that?

MR. ELDRIDGE: Well, perhaps we can address it jointly.

THE COURT: Yes.

MR. ELDRIDGE: It comes up, if my chronology is correct, shortly after Col. Franklin instituted, independent of this litigation, a lawsuit against Reinhart & Winston, relating to a book authored by Jim Wooten as told to Tony Herbert, which is a CBS subsidiary, and a letter from Col. Franklin's lawyer came to Barry Lando, a CBS employee.

MR. GREEN: A letter or a request. I'm not sure.

MR. ELDRIDGE: Barry Lando turned it over to the CBS Law Department for advice. The Law Department memorandum is from the CBS Law Department to people in the News Department and Barry Lando and several other members of the Law Department of CBS who are interested in litigation and general matters, including the assistant (10) general counsel, giving him advice as to what he should do in terms of the letter or request from Col. Franklin's lawyer which preceded a lawsuit which Col. Franklin did in fact file against Reinhart & Winston.

It is a memorandum dated July 17, 1973, written by Michael Golde to people I have noted. Michael Golde was at that time a member of the News Department, and the memorandum was advising the news people.

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It is the position of CBS that this is a privileged document in terms of advice given by lawyers in connection with a matter arising from the outside, where the member of the News Department sought the legal advice as to what to do, from the Law Department.

THE COURT: And the memorandum in question is not the communication from Col. Franklin to Mr. Lando. What we are talking about is the responsive memorandum prepared by CBS.

MR. ELDRIDGE: The memorandum upon privilege is claimed is the letter written by Mr. Golde to CBS news people, including Mr. Lando and the assistant general counsel.

THE COURT: Why isn't that privileged, Mr. Lubell?

MR. LUBELL: First of all, the letter from (11) Col. Franklin's lawyer to Mr. Lando—

MR. ELDRIDGE: The memo?

MR. LUBELL: —from Col. Franklin's lawyer to Mr. Lando has never been produced.

Mr. GREEN: I have never seen the letter before. I presume it was turned over—

MR. ELDRIDGE: We wouldn't be claiming privilege as to this. It may be that the two were attached together. You can't claim privilege on Col. Franklin's letter to Mr. Lando.

THE COURT: Yes. I agree with that.

MR. LUBELL: This is the first I have heard of a document. I am just pointing that out. I thought it might be a telephone communication.

MR. ELDRIDGE: He would have had a conversation possibly with the Law Department.

MR. LUBELL: Insofar as the memorandum itself is concerned, the legal memorandum, that is, the memorandum received from the CBS legal staff, we believe there is an

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area where in a libel case such communications are prudicible, are discoverable. We had requested at this hearing to have some clarification as to the memorandum in order to argue about this further, as to who the addressee was, who were the people receiving it, and (12) it still isn't clear when Mr. Eldridge says "The CBS news people"—it still is not clear to us who that is, whether that is "Sixty Minutes" or beyond "Sixty Minutes" or where the memorandum was disseminated, and I would like to know that information, and I think I would like to have an opportunity to brief the area where there is an exception to the confidential communication protection between attorney and client in libel cases because of the particular importance of those communications in terms of the publisher, or the one who publishes the alleged libel, as to his knowledge or belief that he has as to the falsity or truth of what he ultimately publishes.

THE COURT: Yes. I think that this question should be briefed also within the general context of privilege.

Now, let me turn to some other general subjects.

What I have tried to do—

MR. CURTIS: Your Honor, there is also a question of attorney-client privilege involved in the open questions involving the defendant Atlantic, and maybe we should deal with those if we are going to cover the question.

THE COURT: On Atlantic, all right. I see. (13) What is at issue there?

MR. CURTIS: What is at issue are communications between the editorial personnel at Atlantic and their regular counsel concerning the article prior to and subsequent to its publication.

THE COURT: Is there an outstanding demand for discovery in that area?

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MR. LUBELL: Yes; there is. The chronology of this is that there was an original communication, telephone communication, that he has testified to by the Atlantic people to their attorney out in Boston. He sent a letter. A copy of that letter was sent to Barry Lando. That letter was produced.

There is also testimony that there was subsequent communication or subsequent communications in those areas, subsequent communications between the Atlantic people and their attorney, which are different from the original communications, and I think that should be read within the whole privilege area.

THE COURT: Yes. I would be grateful if you would address that whole privilege area, Mr. Curtis. I simply hadn't been aware of that.

Now, in looking through the letters, I perceive another general area of inquiry, and that has to do with (14) the defendants' refusal up until now to answer questions on depositions concerning the usual procedure followed by CBS in producing segments of "Sixty Minutes". Am I correct in thinking that this is an area of controversy?

MR. LUBELL: I believe so, your Honor.

THE COURT: What do you mean by "usual procedure", Mr. Lubell? In what particular respect?

MR. LUBELL: What we mean in particular is that there are certain things testified to by Mr. Lando as to the procedures he adopted in preparing this particular segment. What we were trying to understand was whether this was consistent with the usual procedure or inconsistent with the usual procedure, based upon the concept that evidence of custom and usage, evidence of practice, evidence of habit are admissible circumstantial evidence from which inferences can be drawn in a number of different contexts, and in this context inferences can be drawn as to whether this was done recklessly, whether

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there was some unusual situation, unusual motivation that resulted in certain procedures being followed.

For example, one thing in particular I might point out is that there was a second filmed interview done of Col. Franklin, which Mike Wallace and everybody else in CBS testified they had no recollection of knowing (15) about at that time. We wanted to find out what the usual procedure was in regard to doing a second filmed interview. We were cut off at that point.

Obviously, our questions would have been on the subject of whether a second film would be usual to discuss with Mike Wallace or the supervisor who was putting on the program, to have a second interview.

All those circumstances never came out, and we believe that those areas are permissible areas of discovery, that they can lead to admissible evidence, and they can lead to circumstantial evidence from which inferences can be drawn.

That is our opinion under the procedures and practices.

THE COURT: Well, you know, Mr. Eldridge, I have a certain sympathy with that approach. The plaintiff has a difficult burden here, but what he is eventually going to ask the jury to do, I suppose, is to draw inferences from the evidence either of malice or reckless disregard.

Now, perhaps particularly with respect to reckless disregard, although not necessarily limited to that, it does seem to me it is pertinent to inquire as to the usual practices and procedures in preparing one of (16) these programs and then contrasting those practices or procedures, whatever they may be, with the practices and procedures that were followed in respect of Col. Herbert, because out of that contrast, if one is established, the seeds of an inference of either malice or careless disregard may grow; but we really can't tell unless we know what the other practices are.

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I confess I have a certain sympathy with the plaintiff on this aspect of it.

MR. ELDRIDGE: Well, Judge, I think when one focuses upon the issue to which plaintiff's counsel is addressing himself and which the Court has raised, we are dealing with the "actual malice" issue, which relates to the question of whether or not the defendant published a calculated falsehood or whether he entertained serious doubts as to truth. That is the definition of reckless disregard.

That makes the test a subjective test in terms of the state of mind of the defendant, not an objective test, as the Courts have more recently suggested in their language, and therefore, if I may, just with a sideline story, in the handling of a case from South Dakota involving the First Amendment, the chief Judge of the District Court there, faced with the problem of NBC's (17) practices, said, to plaintiff's counsel, "Well, tell me how different would it be if NBC had a rule that truckdrivers of a trucking company had a rule that the drivers should never exceed the limit of forty miles an hour wherever they drive, and there is an accident that occurs on a super-speed highway, where the driver is driving within the prescribed limit of, say, sixty-five, and an accident occurs, and then you offer to the jury that NBC or the trucking company in the example prescribed in their rules that their drivers shall never exceed forty miles an hour."

Now, a jury should not be using the exhortative standards that the defendant might choose to use in measuring liability under the law, because he was not in fact speeding, and in fact to hand the jury, as the Chief Judge said to plaintiff's counsel, to hand these exhortatory rules that the trucking company would prescribe for their drivers would be unfair under the circumstances, and he refused to allow the introduction into evidence of NBC News' rules and practices in a similar type case on an actual malice issue.

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Now, I think that story I tell is merely illustrative of how his thinking was, and I submit it was correct and his ruling is correct.

(18) THE COURT: Is that a reported case?

MR. ELDRIDGE: Well, it occurs in the transcript, yes. It is Barry against NBC. My recollection is that the colloquy may be in the transcript. It occurred in chambers.

The case is a reported case, yes, the trial result and the appellate result.

THE COURT: But even assuming, even accepting the subjective as opposed to the objective test, I still don't see where certain inferences could not be drawn on the subjective test from an examination of practices and procedures.

Let me give you a hypothetical, somewhat closer to home than the truckdriver.

We have a read a lot about the Woodward and Bernstein practice of never printing anything unless they have it corroborated by at least two independent sources. Now, just assume for the sake of the argument that discovery would indicate, in respect of the preparation of the "Sixty Minutes" program, that such a practice or something like it was followed, and suppose it should also develop that in respect of the program on Col. Herbert, such a practice was entirely departed from.

MR. ELDRIDGE: They only had one, you mean, (19) one source in your hypothetical, as opposed to two?

THE COURT: Yes, or something along that line, that there was a practice or procedure in respect of the verification of information which was generally followed in the other programs but in a rather dramatic fashion was departed from on the Col. Herbert program.

I am not suggesting for a minute that is so. We are dealing in hypotheticals.

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But if such evidence was developed, couldn't an inference be drawn from that contrast with respect to the subjective frame of mind of the people who were putting the program together?

MR. ELDRIDGE: The trouble I find with that, Judge, is that that is not too different—your example is not too different from the forty miles an hour that the trucking company might prescribe.

Now, the Courts have said that, for example, one source for a piece of information is more than adequate. There is no duty to go out and investigate beyond. Now, if you have a bona fide source for a piece of factual information, as we can only deal with published facts, I think that is made absolutely clear now, so if you have that, the Court would say that the plaintiff had not carried his burden of proving by clear (20) and convincing evidence that the defendant had published a calculated falsehood or there was a reckless disregard for the truth because he only had one source.

Now, the publisher, because he liked to be overly cautious in his approach, because he doesn't like to be sued, suggested in this case that we ought to have two sources. To let the jury know that he requires his people to go beyond what is prescribed by the law and then to permit them to speculate as to whether or not he should be punished because he asked that they go beyond what is required by the law I submit would be highly unfair in this area of First Amendment freedoms and under a subjective test. This jury could only find an award against this defendant if they have transcended and abused their First Amendment privilege, and the mere fact that a publisher places higher requirements upon those responsible for publication should not militate against his First Amendment rights, and that is what this plaintiff wants to do.

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THE COURT: How about the plaintiff's argument that Col. Herbert was put into a very little, wretched room, with bright lights, was made to squint and look dreadful during the actual telecast?

MR. ELDRIDGE: That is the very same room (21) where people were interviewed day after day, and this was the subject of factual testimony. You can ask how many interviews were conducted in that room regularly. I have no objection to that. That has nothing to do with your practices relating to source information.

THE COURT: Well, practices and procedures I suppose would include the physical arrangements.

MR. ELDRIDGE: Whether or not he was placed in a room which had never been used for interviews would have something to do with it, but I don't find that it equates with the type of question that we are talking about, and you and I were talking about the standard involved to defeat his First Amendment privilege.

If the Court likes, we certainly can supply cases to support this thesis. It is not a difficult one, and I think it is rather well established.

THE COURT: Yes, Mr. Lubell?

MR. LUBELL: First of all, I believe that in this Circuit, private safety regulations and rules are admissible for circumstantial evidence from which negligence, for example, or carelessness can be inferred, and I refer to the decision in this Court in *Universe*, 152 Fed. Supp. 903, which in turn discusses a number of other cases, so the question of whether a rule or regulation (22) of the defendant is admissible in this Circuit I think is fairly well established, that it is admissible.

I think that Mr. Eldridge's argument is that that rule is not a standard of safety but a standard of over-caution. He assumes a state of facts which leads to a particular answer.

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I might also indicate that one of the areas of practice, one of the specific areas of practice that we wanted to find out about had to do with the reversal of questions and answers.

THE COURT: Of what?

MR. LUBELL: In the deposition of Mr. Lando, we found that he had changed the order of certain questions and answers that he had posed to Col. Franklin during his interview, filmed interview, changed it when aired on the "Sixty Minutes" segment. We found out that he had specifically called Col. Franklin and asked Col. Franklin's permission to do this on January 30th, a few days after the program went on the air.

In regard to Col. Herbert, the interview Mike Wallace did of Colonel Herbert, Colonel Herbert made a statement at the very beginning of that interview. That statement is placed at the very end of that "Sixty Minutes" program.

(23) Now, we contend that these are reversals of order.

We have found out recently that after the Selling of the Pentagon program and prior to the preparation of this program, CBS promulgated specific guidelines on the reversal of questions and answers, and we do not have those, and those are types of practices.

We want to know what they did here, whether what they did here was consistent with those guidelines. If not, we want to find out something else about it, and I think we have a right to that.

Those are facts as to how this program was produced, from which various inferences concerning the question of malice, that is, knowledge of falsehood or reckless disregard to whether it was true or false, can be drawn, and I think we are entitled to that.

THE COURT: All right.

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I will rule that plaintiffs are entitled to inquire into the general subject of usual procedures followed by CBS in producing segments of "Sixty Minutes". That is all I will say at this time. I will leave it to counsel to implement the Court's ruling, because there isn't time to deal with each particular question, but you must be guided by that general ruling, and if (24) particular problems arise with respect to particular questions, there will have to be further applications.

Another general subject appears to be a request by the plaintiffs for full disclosure concerning communications between the defendants and what is referred to as the Nixon White House on a number of subjects.

Now, the first subject is Col. Herbert, but then, as I understand the papers, that particular subject is then expanded to include the following: CBS war coverage in general; CBS coverage of war crimes and the bias by the Nixon administration or the White House staff against the news media in general or CBS in particular.

Now, I understand that there has been compliance with respect to the first subject, namely, communications between the defendants and the White House staff or personnel with respect to Col. Herbert. The objection that is made to the rest of it, Mr. Lubell, is that this is not possible to comply with. What do you have to say to that?

MR. LUBELL: If I might just focus on why we thought the question was proper, what we were trying to understand was the factual circumstances that existed in the presentation of programs by CBS at that time, particularly news programs regarding the Vietnam War and war (25) crimes and the facts which have come out over the last several years regarding a consistent pressure by staff members of the White House on CBS as well as other media regarding the presentation of programs on those particular subjects and what has come out very

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recently, according to Mr. Colson, at least, in a communication between Frank Stanton of CBS and Colson regarding presentation of CBS programs on the war and war crimes.

We wanted to ascertain what was the course of discussion, what happened in the relationship between the White House and CBS in the presentation of those programs, did what happened result in a motivation by CBS to present a program that conformed to the White House's view of the war or of war crimes, was there pressure on CBS to slant a program? Were they motivated by reason of their motivation with regard to licenses et cetera to present a program in a particular light, and on the questions of motivation, the inferences of motivation are the areas that we are after in terms of these communications.

We do know that there were communications between the White House and CBS regarding programs on the war and everything else. We know that from matters that came out during the Watergate-related investigations. (26) We do not know anything much more specifically, and if we were able to inquire from there to the specific situation, I think we would be able to determine whether in fact there was motivation to put on a program that presented a certain view of war crimes, a certain view that presented the Pentagon's view of this situation, and that is what we were after.

If we are too broad on that, maybe we can redefine it, but I'm not sure whether we can be more specific.

I have expressed what our intention is to counsel for the defendant and expressed it to the Court, hoping that it could be narrowed so as to come within those borders, but I think we have a right to try to ascertain whether in fact there was a situation that existed, an unfortunate situation which existed which did result in a particular motivation or a particular intention by CBS to put on

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a particular program of a particular position, and I might add that one of the interesting side notes is that the Selling of the Pentagon was the trigger for various communications between the White House and CBS and the trigger for this particular program was the interview of Col. Herbert.

THE COURT: What you mean to say is that (27) communications with respect to Col. Herbert don't give you all you need, necessarily, because out of all the general communications and statements made by the White House a foundation may be laid for the drawing of an inference that the defendants did what they did to Col. Herbert in order to try to placate some of these more general expressions of concern or pressure from the White House.

Is that what it comes down to?

MR. LUBELL: General concern and pressures from the White House specifically in the area of the Vietnam War and war crimes.

According to a number of sources, in fact, CBS did make programming changes after the Selling of the Pentagon.

THE COURT: It seems to me both broad and speculative.

What do you say, Mr. Eldridge?

MR. ELDRIDGE: Judge, I wouldn't know how to start such an investigation in terms of CBS news along, coverage of the Vietnam War or coverage of general areas.

We allowed him to ask questions about Col. Tony Herbert, and he asked questions in terms of communications between the White House and the Pentagon and (28) what-have-you, and the answer is no.

Now, he reads in the newspapers, as people do, what might be on the White House tapes, what communications might have occurred, and now he wants to go beyond the News Department and examine executive personnel, possibly former White House staff, in terms of communications that might have occurred, but not Col. Herbert.

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When we restrict it to Col. Herbert, that is not enough. Now, this case involves Col. Herbert, and the program even has his name in the program.

The Selling of the Pentagon, as the Court may remember, years before, related to a Congressional investigation of whether Frank Stanton, then president of CBS, should be cited for contempt. Nothing was done on it.

Now, all the information we now have—and I point out particularly, those responsible for the publication are the critical people involved—he has examined those people at CBS, and he has gained from them all of the information we had or knew about or sources we communicated with, prior to the publication of this program.

Now, to go off on this tangent, particularly (29) in an area that makes it impossible for us to do our own discovery in the broad, general areas of war coverage et cetera—I couldn't even make an estimate of the amount of news coverage the Vietnamese War had on CBS and other networks and what kind of communications, whether the gentlemen at the White House might have called and said, "You're showing an awful lot of blood in terms of the coverage of the Vietnamese War."

Well, he wants to go into questions about that, and I fail to see where that could lead to any discoverable evidence. It is just harassment of the defendant, because we have no way of going back to the files on the Vietnamese War to find that.

This should be related to Tony Herbert, and we have not prohibited his discovery in that area.

I might note that this Circuit just recently, on this Buckley case, which was decided June 30, 1976, in this Circuit, noted on the question of actual malice—4611, the slip opinion—repeatedly the Court has said, "The ill will towards the plaintiff, bad motive, hatred, spite, a desire to injure are not the kind of malice that the Sullivan against New York Times case comprehends."

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I would submit even such motive in terms of the most recent Second Circuit ruling would not lead to (30) the discovery of relevant evidence under the malice test, even if you compare the thesis of his argument to the logical conclusion and forget the problems we have in regard to the defense.

THE COURT: I am going to limit the plaintiffs on this subject of communications to communications between them and the White House relating to Col. Herbert. It seems to me that to go as far afield as the plaintiffs are attempting to go is much too broad, goes too far afield, and the potential probative value of such inquiries is not sufficiently significant in my judgment to warrant that expanded inquiry.

So, again, I will leave it to counsel to implement that general ruling.

Another area that appears to arise is questions which the defendants have refused to answer with respect to expenses incurred by CBS or its employees in preparing the "Sixty Minutes" segment.

I will rule that questions relating to expenses can and should be answered, but I will restrict the subject of expenses to the expenses of the actual reporters who were involved and those working under them in the gathering of facts for broadcast. This is to say, I don't see any significance or importance with respect to (31) charges for cameramen or stagehands or things of that nature.

It is my view that an examination of the expenses incurred in the actual threshing of the wheat which appeared in the program, particularly when contrasted or viewed within the context of customary procedures for this program, which I have also ruled are a proper subject of discovery, may lead to admissible evidence.

MR. ELDRIDGE: May I have a moment on that subject?

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Our problem is a logistical problem. We don't keep expenses in terms of program segments. I don't know how we are going to find Barry Lando's individual expenses in terms of the segment which is the subject of the libel suit.

THE COURT: Well, if as a practical matter—

MR. ELDRIDGE: That is our problem.

THE COURT: If it simply can't be answered, that is a sufficient answer under the rules. I am addressing myself to the propriety of the field of inquiry.

MR. ELDRIDGE: Well, you could conceivably direct the staff to search CBS's news expenses for a year to find Lando's records, but you can't go to a (32) segment here and pick out the expense items. I don't know where we would go to do this. That is what we are urging, that it is an impossible job, where the company doesn't keep its vouchers on a reporter's trip, say, from here to Washington, in terms of a particular segment.

THE COURT: Well, I may have misunderstood. I got the impression from the papers that the objection was one more of irrelevance than of practical impossibility. If it can't be answered, it is a sufficient answer to say so.

MR. ELDRIDGE: I don't know how you could direct it unless you contemplate an overbearing examination of our expense records.

THE COURT: I limit my direction to one which is to the effect that inquiries into expenses incurred with respect to this particular segment are a legitimate field of inquiry. That is all I am saying at this time. If at a subsequent time you interpose answers along the lines of what you have just said, Mr. Eldridge, then the sufficiency of those answers can be tested.

Another field of controversy—and perhaps this is all we can cover this morning—has to do with timing, as I understand it.

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Let me see if I can pinpoint that. I understand (33) it to be an area of dispute as to whether the defendants are obliged to produce documents—yes; it is a general inquiry, as I understand it, for the production of documents or the asking of questions regarding communications between CBS and Wallace and any individual appearing on the broadcast, which may have taken place subsequent to the segment's airing on television.

I understand that defendants' position is that they must produce and have produced all relevant documents in this category created prior to the broadcast but that they are not obliged to produce such documents or communications which took place after the broadcast.

Have I correctly characterized the area of disagreement?

MR. ELDRIDGE: As I understand, in the area to which you are addressing yourself, I believe our position was that in terms of the actual malice test, which is what this line of inquiry goes into, the test is whether or not the defendants charged with responsibility for the publication at the time of the broadcast published a calculated falsehood or entertained serious doubts as to the truth.

Now, to ask what kind of information came to their attention or questions or discussions, assuming they (34) are not privileged, or something after the claim is filed, what communications they had after that to me would not be probative of the state of mind of the defendants at the time of publication.

THE COURT: But how about the reckless disregard of the truth? Isn't that a possible basis of liability in this case? We don't have, it seems to me, a hot news situation. Therefore, under the law, it seems to me, as I understand it, a possible avenue of liability is a complete or total or reckless disregard of truth or accuracy. Isn't that so?

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MR. ELDRIDGE: Judge, you will look long and hard on a hot news issue to find a case which holds to the plaintiffs entitled to that.

Indeed, if you took all the magazine cases, which have considerable lead time—and many of those cases made considerable law—and you match them against all the broadcast cases of daily broadcasting or such as Berry, which is, you know, a journalistic venture, which has considerable lead time, you will find the rule of law is identical in each case.

There is no case which says whether you have a short lead time or a long lead time the rule of law will (35) change, and indeed, with respect to reckless disregard, I submit that the St. Amant case clearly, in the Supreme Court, said that by reckless disregard for truth we mean did the defendant entertain serious doubts as to the truth, meaning those responsible for the publication.

Now, that has been refined to be a subjective test, so it is no longer and it never has been, as I understand St. Amant, a super-negligence test. It just isn't that. And therefore, if you focus on what the actual malice test is, it is the subjective state of mind with respect to the knowledge of the defendant at the time he communicates to third parties or publishes, and when you go beyond that, you are just wasting your time. Anything that he learns after that will not play a part in what his state of mind was when he went to press, because that is the critical time, and that alone, and that is the point of our basic objection of getting into all the communications that may or may not have been had, inside or outside of the publishing house.

THE COURT: All right. I want a brief on that. Include that in your brief, please, both parties.

I confess I would have thought that post-broadcast communications might have led to evidence which could

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then support an inference as to pre-broadcast state (36) of mind, but I understand what you are saying to me, Mr. Eldridge.

I prefer not to decide this particular aspect of the case until it is further briefed, and I think it is important that we do so at this time, because it goes very close to the bone.

It seems to me that the parameters of discovery are going to have a great deal to do with whether or not the plaintiff can sustain the burden which he has in the case, and therefore it seems to me it is a useful exercise for all of us to consider the discovery questions with considerable care and to brief these disputed areas on the law at this time.

I know it is going to be helpful to me in a situation where the plaintiff must essentially prove someone else's state of mind.

It does seem to me that discover is a most significant part of the case. I think it is out of the seeds of discovery—perhaps more so in this situation than in most situations—that out of those acorns the plaintiff's oak is either going to grow or not.

I wish I could continue this dialogue, but I can't.

I must get on to my jury trial.

(37) I have made certain specific rulings. I have asked for briefs on others. I am aware that I have not touched all of the disputed areas in the discovery field. Therefore, counsel may address any additional questions that they wish in their briefs, and I think that main briefs on discovery questions should be filed and exchanged within a reasonable period of time.

What would counsel suggest on that? I will get to it as soon as I have the briefs or as soon as I can thereafter, but what I have in mind is a fairly elaborate briefing on discovery issues, because it seems to me the questions are important for the reasons I have suggested,

*Transcript of Proceedings Before Hon. Charles S.  
Haight, Jr., Dated July 21, 1976*

and I would welcome main briefs and reply briefs on discovery issues.

MR. LUBELL: Maybe the best thing is for counsel to discuss it among themselves.

THE COURT: Yes. Why don't you work out a schedule on that?

MR. ELDRIDGE: The only thing is that certain people I know are going to have vacations.

THE COURT: I understand. I won't put any pressure on counsel as to that. I think that is something you can work out yourselves, but I feel that I need further guidance on this and other areas, and I would be grateful for any help you can give me on that.

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**Letter, Dated July 22, 1976, From Plaintiff's Counsel  
to Counsel for All Defendants**

LAW OFFICES

COHN, GLICKSTEIN, LURIE, OSTRIN & LUBELL

1370 Avenue of the Americas

New York, N. Y. 10019

July 22, 1976

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*Letter, Dated July 22, 1976, From Plaintiff's Counsel to  
Counsel for All Defendants*

Re: *Herbert v. Lando, et al.*

Dear Messrs. Eldridge, Green & Curtis:

Following the discussion with counsel yesterday morning concerning the most convenient date for briefs from the parties on outstanding discovery disputes, I spoke with Judge Haight's law secretary, Mr. Schlessinger, about an exchange of main briefs on September 15, and an exchange of reply briefs on September 30. These dates are acceptable to Judge Haight.

In addition to those specific areas upon which the Judge has requested briefing by the parties, plaintiff will raise all remaining open issues set forth in our exchange of correspondence not disposed of by the Judge's rulings on July 21, 1976. If defendants determine that some of these disputed areas can be further reduced, we would appreciate being so advised as soon as possible.

Very truly yours,

COHN, GLICKSTEIN, LURIE, OSTRIN  
& LUBELL

MARY K. O'MELVENY

MKO'M:lle

cc: Honorable Charles S. Haight, Jr.  
United States District Judge  
U. S. Courthouse  
Chambers, Room 2904  
Foley Square  
New York, New York 10007

**Affidavit in Support of Plaintiff's Motion to Compel  
Discovery**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

---

ANTHONY HERBERT,

*Plaintiff,*

*against*

BARRY LANDO, MIKE WALLACE, COLUMBIA BROADCASTING  
SYSTEM, Inc., and ATLANTIC MONTHLY COMPANY,

*Defendants.*

Civil Action No. 74 Civ. 434 (CSH)

---

STATE OF NEW YORK,  
COUNTY OF NEW YORK, SS.

JONATHAN W. LUBELL, being duly sworn, deposes  
and says:

1. I am a partner in the law firm of Cohn, Glickstein,  
Lurie, Ostrin & Lubell, the attorneys for plaintiff. This  
affidavit is made in connection with plaintiff's motion  
under Rule 37, FRCP, to compel discovery.

2. The motion involves unanswered questions posed to  
defendants Lando and Wallace, to defendant CBS by  
Donald Hewitt and William Leonard and defendant At-  
lantic Monthly by Robert Manning and Richard Todd. In  
addition, various document demands addressed to Lando,  
CBS and Wallace, and Atlantic Monthly are also in issue.  
While the questions and document demands involve four  
different defendants and six witnesses, the legal issues  
raised by the objections thereto fall into certain definable

*Affidavit in Support of Plaintiff's Motion to Compel  
Discovery*

areas which cut across the parties and witnesses. These  
legal issues are discussed in the accompanying Memorandum  
of Law. Set forth below are listings of the open  
questions and demands keyed to the points discussed in  
the Memorandum of Law.

A. Questions and Demands involving State of Mind—  
Conclusions, Intent, Motive. (POINT ONE of Memo-  
randum)

1. Whether conclusion was reached by witness as to  
particular matter

p. 666 1. 20-22\*

p. 774 1. 5-7

p. 1486 1. 12-17

p. 1490 1. 21-25

p. 1525 1. 18-22

p. 1554 1. 20-22

p. 1791 1. 21

p. 1877 1. 3-6

p. 1877 1. 15-16

p. 1900 1. 17-22

p. 1925 1. 11-13

p. 1926 1. 4-6

p. 1926 1. 10-15

p. 1953 1. 21-24

p. 1954 1. 4-6

p. 1955 1. 2-17

p. 2013 1. 21-24

p. 2085 1. 23-

2086 1. 3

p. 2312 1. 18-19

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\*Page numbers not preceded by a letter refer to pages of  
the Lando deposition. In reference to the other depositions the  
following letters are used: W-Wallace, H-Hewitt, WL-Leonard,  
M-Manning, T-Todd.

*Affidavit in Support of Plaintiff's Motion to Compel  
Discovery*

p. 2453 1. 5-10  
 p. 2454 1. 8-11  
 p. 2888 1. 18-23\*  
 p. 2889 1. 5-9  
 p. 2889 1. 16-18  
 p. 2890 1. 7-11  
 p. 2890 1. 15-16  
 p. 2890 1. 19-21  
 p. 2891 1. 6-10  
 p. 2891 1. 13-14  
 p. 2892 1. 4-7  
 p. 2892 1. 12-15  
 p. 2892 1. 17-19  
 p. 2892 1. 21-24  
 H p. 151 1. 24-  
 152 1. 3

2. Basis for conclusions which witness testified he reached

p. 668 1. 8-9  
 p. 1530 1. 22-23  
 p. 1748 1. 4  
 p. 1892 1. 18-22

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\*This page reference and the ones following were not specifically set forth in the exchange of correspondence between plaintiff's counsel and counsel for Lando. However, all of these questions fall directly within item (6) of the O'Melveny letter of June 22, 1976 to Green ["questions concerning Lando's opinions and conclusions concerning the truth and accuracy of persons interviewed, appearing on or referred to in connection with the '60 Minutes' segment or the Atlantic Monthly article"]. That letter stated the items described therein as the subject of plaintiff's Rule 37 motion. As soon as counsel realized the omission of these specific pages, the information, on the morning of September 21, 1976, was telephoned to Lando's counsel.

*Affidavit in Support of Plaintiff's Motion to Compel  
Discovery*

3. Basis for including certain statements and excluding contradictory statements

p. 876 1. 19-23  
 p. 878 1. 19-  
 879 1. 2

4. Intention in including certain statements and excluding other statements

p. 525 1. 12-18  
 p. 668 1. 12-13  
 p. 668 1. 16-18  
 p. 1138 1. 18-21  
 p. 1139 1. 2-6  
 p. 1139 1. 10-15  
 p. 1790 1. 17-22  
 p. 1905 1. 11-  
 1906 1. 8  
 p. 1907 1. 15-  
 1908 1. 3

5. Conversations regarding the inclusion of certain statements and exclusion of other statements

p. 586 1. 15-19  
 p. 880 1. 5-7  
 p. 1754 1. 25-  
 1755 1. 7  
 p. 1789 1. 24-  
 1790 1. 2

*Affidavit in Support of Plaintiff's Motion to Compel  
Discovery*

6. General state of mind

p. 176 1. 3-6

B. Questions and Demands Concerning Activities and  
Occurrences after Publication (POINT TWO of memo-  
randum)

p. 1331 1. 23

p. 1717 1. 6

p. 2303 1. 6-9

p. 2303 1. 13-15

p. 2556 1. 17-20

p. 2572 1. 4-7

p. 2573 1. 2-5

p. 2583 1. 18-21

p. 2685 1. 8-13

M p. 198 1. 11-13

M p. 203 1. 18-

204 1. 1

M p. 234 1. 21-24

M p. 236 1. 2-4, 7-8

T p. 117 1. 18-20, see

p. 118 1. 6-10

T p. 143 1. 16-

144 1. 9

Documents described under Item 17 of O'Melveny letter  
of June 22, 1976 to Richard G. Green

Documents described under Item 12 of O'Melveny letter  
of June 22, 1976 to Carleton G. Eldridge, Jr.

C. Questions and Demands Concerning a CBS Document  
Relating to Lando and Col. Franklin's Suit Against Her-  
bert (POINT THREE of Memorandum)

p. 724 1. 24-25

p. 977-978

H p. 109 1. 18-24

*Affidavit in Support of Plaintiff's Motion to Compel  
Discovery*

Document described under Item 7 of O'Melveny letter  
of June 22, 1976 to Carleton G. Eldridge, Jr.

D. Questions and Demands Concerning Communications  
Between Atlantic Monthly and Conrad Oberdorfer (or  
other counsel) involving Lando's Manuscript and Article  
(POINT FOUR of Memorandum)

M p. 119 1. 22-24

See item 11 of Lubell letter of June 25, 1976 to  
Frank Curtis and Item 11 of Curtis letter of July  
2, 1976 to Lubell

3. In addition to the above matters, there remains a  
dispute concerning (A) documents in the possession of  
CBS News, Wallace or Lando during the period from  
June 1, 1971, to February 4, 1973, (to May 1973 in regard  
to Lando) regarding Col. Herbert, the 173d Airborne Bri-  
gade while in Viet Nam, individuals appearing or re-  
ferred to on the 60 Minutes segment and events described  
in Soldier and (B) documents relating to communica-  
tions or correspondence with McCauley, Wooten, Holt  
Rinehart & Winston and employees of Atlantic Monthly  
concerning Herbert, his charges, and/or the truth and  
accuracy of the "60 Minutes" segment or any individual  
appearing or quoted thereon. (See O'Melveny letter of  
June 22, 1976, to Green, Items 13 and 14 and Lubell letter  
of July 19, 1976, to Eldridge, Items 8 and 9). The area  
of dispute that remains concerns the production of docu-  
ments that were in the possession of the parties indicated  
during the stated time period and concerning the de-  
scribed subjects but which were not specifically known to  
Wallace and Lando at the time the Program was being  
produced. Plaintiff believes that such documents are dis-  
coverable in that they are likely to lead to the discovery  
of admissible evidence relating to whether defendants pub-  
lished the charged libel in reckless disregard of its truth

*Affidavit in Support of Plaintiff's Motion to Compel  
Discovery*

or falsity. As noted in POINT ONE of the accompanying Memorandum, various matters are admissible as some evidence bearing on defendants' state of mind.

4. In connection with the communications between Atlantic Monthly and its attorneys I have attached hereto the letter of March 9, 1973, from Conrad Oberdorfer to Atlantic Monthly. Other exhibits and documents referred to in plaintiff's Memorandum will be submitted upon request of the Court.

5. In connection with the refusal of defendants to answer questions or produce documents after publication based upon a claim of "work product," the bringing of a suit against CBS and Atlantic Monthly became an expectable contingency on December 11, 1973. Prior to that date I had been representing Colonel Herbert in a libel suit brought against him, James Wooten and Holt Rinehart and Winston arising out of the book *Soldier*. Approximately two days prior to December 11, 1973, Herbert, myself and other counsel from my firm came to the conclusion that we could anticipate a legal suit being brought by Herbert against CBS and Atlantic Monthly. The first time this anticipation was communicated to an outside person was on December 11, 1973, at a conference with Timothy Dyk, Washington D. C. counsel for Holt, a subsidiary of CBS. I am not aware of any expectation by Herbert prior to approximately December 9, 1973, that a suit would be brought against CBS or Atlantic Monthly.

6. Plaintiff has excluded from his brief any discussion of defendant Wallace's claim of journalist's privilege, based upon a telephone call I received on September 17, 1976 from Wallace's attorney, Paul Jones, advising me that Wallace will not continue to attempt to assert that privilege.

*Affidavit in Support of Plaintiff's Motion to Compel  
Discovery*

7. For the reasons stated in the accompanying Memorandum of Law I respectfully request that this Court direct defendants to answer the questions to which they have objected and to produce the documents which they have refused to produce in the course of pre-trial discovery in this case.

JONATHAN W. LUBELL

Sworn to before me this

22nd day of September, 1976

MARY K. O'MELVENY

Notary Public, State of New York

No. 31-8219570

Qualified in New York County

Commission Expires March 30, 1978

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*Affidavit in Support of Plaintiff's Motion to Compel  
Discovery*

CHOATE, HALL & STEWART

28 State Street

Area Code 617

Telephone 227-5020

Cable Address Chohalste

BOSTON, MASS. 02109

March 9, 1973

Mr. Robert Manning,  
Editor in Chief  
The Atlantic Monthly  
6 Arlington Street  
Boston, Massachusetts 02116

Re: THE SELLING OF COLONEL HERBERT  
by Barry Lando

Dear Bob:

This will supplement my telephone message earlier this week to the effect that I saw no legal objection in principle to your going ahead with the Lando article, but that I had some possible reservations which I would specify later. Here they are, and they are very few.

It may be advisable to remove the gratuitous reference to Arnheiter in connection with "liar" in line 6 on page 16 even though this only purports to quote Wallace.

If you want to be abundantly cautious, you might use something such as "invention" or "fiction" in a few places instead of "liar," and similarly for the verb. E. g., last line on page 16 and fourth on page 17. On page 18, line 9, and page 33, line 12, "liar" appears to have been already deleted. The same seems to be true of the reference to a "skunk" on page 14, line 15.

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*Affidavit in Support of Plaintiff's Motion to Compel  
Discovery*

As an editorial comment, "1962" in line 8 on page 23 is obviously an error.

I understand that between the public interest aspects of the article (exposure to liability) and the generous publicity L'affaire Herbert has already received (making it hard to see what substantial additional damages would *could* be found (*minimizing*) in his favor), the risk of a successful libel suit by Herbert (or anyone else) is very small. Apropos publicity, you may add the enclosed review of the book and an interview with Herbert, from National Review and B.A.D., respectively, and these from rather opposite quarters, to your files, if you have not already seen them.

The B.A.D. piece quotes Herbert, quoting in turn the following as a "most important" statement allegedly made by Lando in the presence of three witnesses: "I'll get you, Herbert." If the Lando article were to contain serious untruths and if Lando's threat could be proved, Herbert might have a considerably easier case. While I am not making either of these assumptions, I recommend nonetheless that you query Lando regarding his alleged statement and keep a memorandum of his denial or explanation of what he meant. If he were to admit to anything even suggesting "malice" against Herbert in the sense of willingness to ruin or damage Herbert's reputation regardless of the facts—certainly not something that is likely or apparent from the tenor of this article as a whole—you would of course have serious second thoughts, even without my advice regarding the effect this might have if Herbert ever did bring a suit. In connection with the Lando threat, however, I note in passing that according to Lando (page 45, end of first paragraph) Herbert also accused the Army of having in effect determined to "get this guy" (Herbert).

Sincerely yours,

CONRAD W. OBERDORFER

Enclosures

CWO:dbw

**Opinions and Orders of Courts Below—Printed in Appendix to the Petition for Writ of Certiorari**

Printed in the Appendix to the Petition for Writ of Certiorari at the Pages Designated

Memorandum and Order per Judge Haight dated  
January 4, 1977 Concerning Plaintiff's Re-  
quests for Additional Discovery ..... 53a-89a

Memorandum Opinion and Order per Judge  
Haight dated February 22, 1977 Certify-  
ing the Court's Prior Memorandum and  
Order dated January 4, 1977 ..... 90a-98a

Opinion of the Court of Appeals Dated Novem-  
ber 7, 1977 ..... 1a-52a

Supreme Court, U. S.

FILED

FEB 22 1978

MICHAEL RODAK, JR., CLERK

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IN THE  
**Supreme Court of the United States**

October Term, 1977

No. 77-1105

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ANTHONY HERBERT,

*Petitioner,*

—against—

BARRY LANDO, MIKE WALLACE and CBS Inc.,

*Respondents.*

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SECOND CIRCUIT

---

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**BRIEF OF RESPONDENTS IN OPPOSITION**

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February 22, 1978

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<i>Cervantes v. Time, Inc.</i> , 464 F.2d 986 (8th Cir. 1972), cert. denied, 409 U.S. 1125 (1973) .....	13n, 16n
<i>Columbia Broadcasting System, Inc. v. Democratic National Committee</i> , 412 U.S. 94 (1973) .....	5n, 15
<i>Curtis Publishing Co. v. Butts</i> , 338 U.S. 130 (1967) ....	13n
<i>Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Board</i> , 542 F.2d 1076 (9th Cir. 1976), cert. denied, 430 U.S. 940 (1977) .....	13n
<i>Gertz v. Robert Welch, Inc.</i> , 418 U.S. 323 (1974) .....	13n
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<i>United States v. Nixon</i> , 418 U.S. 683 (1974) .....	11
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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1977

No. 77-1105

---

ANTHONY HERBERT,

*Petitioner,*

—against—

BARRY LANDO, MIKE WALLACE and CBS, Inc.,

*Respondents.*

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SECOND CIRCUIT

---

**BRIEF OF RESPONDENTS IN OPPOSITION**

---

**Opinions Below**

The interlocutory decision and opinions of the United States Court of Appeals for the Second Circuit are reported at 24 Fed. Rules Serv.2d 221 (2d Cir. 1977) and are set forth as Appendix A of the Petition (1a-52a). The Memorandum and Order of the United States District Court is reported at 73 F.R.D. 387 (S.D.N.Y. 1977) and is reproduced in Appendix B of the Petition (53a-89a). The Memorandum Opinion and Order of the District Court certifying its prior Memorandum and Order is unreported and is reproduced in Appendix C of the Petition (90a-98a).

### Jurisdiction

The Petitioner asserts that the jurisdiction of this Court arises under 28 U.S.C. § 1254(1) (1970).

### Question Presented

Whether an interlocutory ruling of the United States Court of Appeals for the Second Circuit correctly held that the First Amendment to the United States Constitution provides protection against disclosure of the editorial process of the press in pre-trial discovery conducted in a libel case governed by *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

### Constitutional Provision Involved

The First Amendment to the United States Constitution provides:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

### Statement of the Case

The case arises out of a highly publicized and extremely heated dispute between Petitioner Anthony Herbert, a former lieutenant colonel in the United States Army, and the Army itself: Herbert claims that while on duty in Viet Nam he observed and reported various war crimes to his superiors; the Army flatly—and explicitly—denies that.

On February 4, 1973, the CBS television network broadcast the program "60 MINUTES", one segment of which dealt with the Herbert-Army controversy. In this defamation action relating to that segment, Herbert has sued Respondents CBS Inc. ("CBS") and Messrs. Lando and Wallace, respectively, the individual producer of and correspondent for the segment. There has been no dispute that Herbert is a public figure or public official—or both—and that the case is therefore governed by principles set forth in *New York Times Co. v. Sullivan*, *supra*, and its progeny.

By agreement of counsel, Herbert was permitted to begin and complete discovery of defendants Lando, Wallace and CBS before the commencement of defendants' discovery of Petitioner. Herbert's discovery began with the production of thousands of pages of documents by the defendants; Herbert also attended screenings of the segment and related filmed interviews.

Herbert's deposition of Lando began on August 1, 1974 and was concluded, over a year later, subject to a ruling by the District Court on disputed areas. The deposition was exhaustive in its scope. Indeed, as summarized by Chief Judge Kaufman:

"The sheer volume of the transcript—2903 pages and 240 exhibits—is staggering. Lando answered innumerable questions about what he knew, or had seen; whom he interviewed; intimate details of his discussions with interviewees; and the form and frequency of his communications with sources. The exhibits produced included transcripts of his interviews; volumes of reporters notes; videotapes of interviews; and a series of drafts of the '60 Minutes' telecast. Herbert also discovered the contents of pre-telecast conversations between Lando and Wallace as well as re-

actions to documents considered by both." (footnote omitted) (Pet. 18a-19a)

The number of questions to which objections were raised and which became the subject of Petitioner's Rule 37 motion relate, in the main, to matters which did not even appear in the broadcast. They involve Lando's beliefs, opinions, intent and conclusions; they range from questions designed to elicit "Lando's conclusions during his research and investigation regarding people or leads to be pursued, or not to be pursued . . ." to other questions which inquire into "Lando's intentions as manifested by the decision to include or exclude material" (Pet. 57a-58a).

Illustrative questions include

- whether Lando "ever came to a conclusion" that it was unnecessary "to interview one individual" (p. 666)\*;
- what "the basis" was for Lando's decision to interview one soldier three times and not to interview another soldier (p. 667);
- what "the basis" was for including in the broadcast a statement by one individual and not another regarding Herbert's treatment of Vietnamese (p. 876);
- whether Lando had "propose[d] to include in the program" certain favorable statements about Herbert (p. 877);
- and a wide variety of other questions relating to the editorial selection process by which CBS and its employees determined what to include in the "60 MINUTES" segment relating to Herbert.

\* References to "p. —" are to pages of the Lando deposition, which was part of the record on appeal in this matter.

When Lando, on advice of counsel, declined to respond to these and related questions, plaintiff sought an order compelling discovery pursuant to Rule 37(a)(2), Fed.R.Civ.P.

### ***The District Court Opinion***

On January 4, 1977, the Hon. Charles S. Haight, Jr., U.S.D.J., entered a Memorandum and Order directing Respondents to respond to essentially all the disputed discovery sought by plaintiff (Pet. 53a-89a). Judge Haight's opinion concluded that given the "already heavy burden of proof" upon a public figure plaintiff in a *Sullivan*-governed libel suit, such a plaintiff was entitled to "liberal interpretation" of pre-trial discovery rules (Pet. 62a-63a).

All claims of First Amendment protection—or even the relevance of First Amendment considerations to the scope of the sought discovery—were summarily rejected by the District Court. Cases cited by CBS to demonstrate the extraordinary breadth of protection afforded the press in its editorial decision-making process\* were distinguished on their facts and rejected insofar as they were urged to set forth relevant bodies of law: "these cases", the District Court concluded, "have *nothing to do* with the proper bounds of pre-trial discovery in a defamation suit alleging malicious publication." (Emphasis added) (Pet. 67a)

On February 22, 1977, having received a request from Respondents seeking certification of the decision pursuant to 28 U.S.C. § 1292(b) (1970), and an opposition thereto from Petitioner, the District Court entered a new Memorandum Opinion and Order, amending its previous decision and making the findings required by Section 1292(b) as a

\* *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974) ("Tornillo"); *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973) ("CBS").

prerequisite to interlocutory appeal (Pet. 90a-98a). By order entered without opinion on March 17, 1977, the United States Court of Appeals for the Second Circuit granted the petition for leave to appeal.

### The Decision of the Court of Appeals

The Court of Appeals, in opinions of Judge Kaufman and Judge Oakes, reversed the decision of the District Court; Judge Meskill dissented.

Judge Kaufman divided the questions at issue on appeal into five categories:\*

- "1. Lando's conclusions during his research and investigations regarding people or leads to be pursued, or not to be pursued, in connection with '60 Minutes' segment and [a subsequent magazine article by Lando];
- "2. Lando's conclusions about facts imparted by interviewees and his state of mind with respect to the veracity of persons interviewed;
- "3. The basis for conclusions where Lando testified that he did reach a conclusion concerning the veracity of persons, information or events;
- "4. Conversations between Lando and Wallace about matter to be included or excluded from the broadcast publication; and

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\* Although the scores of specific discovery questions at issue were included in the record on appeal, the Court of Appeals was neither asked, nor did it choose, to deal with each specific question. Instead it limited its consideration to the categories described above, leaving for the District Court the task of evaluating whether specific questions asked of Lando fall within the editorial process privilege. See Pet. 46a (Opinion of Oakes, J., concurring).

- "5. Lando's intentions as manifested by his decision to include or exclude certain material." (Pet. 19a-20a)

Both Judge Kaufman and Judge Oakes emphasized the important protection afforded the editorial process decisions of the press by the First Amendment, a protection each found reflected in this Court's decisions in *Tornillo* and *CBS*. Analyses of those cases, the holding of *New York Times v. Sullivan* itself and its progeny in this Court, and the emerging body of district and appellate court decisions dealing with procedures to be used in libel suits are set forth at length in their respective opinions. The opinions conclude that to ignore First Amendment considerations and to allow discovery of the editorial process as reflected in the five categories of questions at issue would have an impermissibly inhibiting effect on the press in the performance of its editorial functions. Accordingly, the Court of Appeals reversed the District Court's order compelling discovery as to such matters and remanded the matter to the District Court in order that the principles enunciated by the Court of Appeals might be applied to the specific questions posed in discovery.

Judge Meskill dissented. His opinion acknowledged that responses to the questions at issue would have "a 'chilling' or deterrent effect", but urged that judicial review "is supposed to" chill, since "[t]he publication of lies should be discouraged." (Pet. 46a)

### ARGUMENT

It is Respondents' position that in concluding that the First Amendment afforded protection for the editorial process deliberations of the press, the Court of Appeals properly took account of the substantial First Amendment considerations at stake with respect to discovery matters

in libel suits governed by *Sullivan*. For this reason alone, Respondents believe review by this Court would be inappropriate. In any event, however, and notwithstanding the undoubted significance of the Second Circuit's decision, the interlocutory character of the present ruling, the status of the case on remand, and the absence of decisions on this matter from other district or circuit courts indicate that this case is simply not ripe for review by this Court.

### I.

#### **This Matter Is Not Ripe for Review by This Court.**

The petition in this matter seeks certiorari with respect to a case which is not ripe for review under the principles customarily applied by this Court. This Court has, over the years, articulated a high degree of reluctance to consider, via certiorari, non-final decisions of Courts of Appeals. *American Construction Co. v. Jacksonville, T.&K.W. Ry.*, 148 U.S. 372, 384 (1893). Indeed, a lack of finality, "of itself alone furnishe[s] sufficient ground for the denial" of a writ of certiorari. *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). The Court has indicated that a writ of certiorari will not be issued in interlocutory matters "unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Construction Co. v. Jacksonville, T.&K.W. Ry.*, *supra*, 148 U.S. at 384.

Here, of course, notwithstanding the significance of the issues confronting the Court of Appeals, the only potential "embarrassment" or "inconvenience" to Petitioner in the conduct of this matter, even were the Court of Appeals' ruling to be in error, would be the possibility of a trial or dispositive motion heard with less than complete discovery. This situation is routinely encountered in applying a final

judgment rule and hardly rises to a level sufficient to overcome the problem posed by piecemeal appeals.\*

The difficulties inherent in most interlocutory appeals are, if anything, magnified here. The Court of Appeals framed its decision in terms of the five discrete categories of discovery requests defined by Judge Kaufman (Pet. 19a-20a). The Court of Appeals remanded the case in order that the principles of its decision be applied to specific questions which might or might not fit within those five categories or otherwise fall within the privilege described in its decision. The mere fact of a pending remand has itself been a basis for denial of certiorari. *See Brotherhood of Locomotive Firemen v. Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967). Review at this time would deny this Court the benefit of the results of just such a remand and the subsequent adjudications on the merits in which the effect of the privilege would become clear.

The Petition itself suggests the desirability of further proceedings if this Court is even to consider review based on Herbert's claim that the approach adopted places too great a burden on a libel plaintiff. The Petition includes eight printed pages of factual assertions (with many of which Respondents take issue)\*\* which Herbert apparently

\* The adequacy of the material available to Petitioner to prepare for trial or a summary judgment motion was considered in the opinions below and is discussed in Part II, *infra*.

\*\* The extended statement of facts relating to the underlying libel case seems largely irrelevant to this Petition—except insofar as it suggests the difficulty of any review at this stage of a complex litigation where neither the District Court nor the Court of Appeals has had the opportunity to review and rule upon the factual allegations set forth by Petitioner. Accordingly, we have refrained from responding to each of many factual errors.

One glaring example is illustrative of the problem of a detailed factual discussion in the absence of the sharpening which a summary judgment motion or a trial would bring. The Petition accuses the Court of Appeals of "misstatements of fact" and by way of illustration notes Judge Kaufman's reference to Lando's production

believes necessary for an understanding of the significance of the discovery sought in any review of the Court of Appeals' decision. Yet, given the interlocutory stage of the case, neither the District Court nor the Court of Appeals has considered—let alone made—any findings of fact which could guide this Court in assessing those assertions. Nor has either Court yet considered whether any genuine issues of fact exist. Any attempt by this Court to review the interlocutory ruling of the Court of Appeals in the specific context of the facts would thus be significantly handicapped.

The problem is exacerbated by the fact that the allegedly vital nature of the discovery at issue is premised on the special nature of Herbert's theory of the case: that the broadcast of statements by the participants in a controversy may give rise to a libel where one side is supposedly given more time and one or another allegation of the "other" side is omitted. In effect, Herbert argues, libel law permits the imposition of liability for the supposed

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of "a laudatory report which was televised on July 4, 1971 over the CBS network." (Pet. 9n.) "No such report exists", the Petition baldly asserts, without explanation or qualification. (*Id.*) A reading of the Petition would suggest that Judge Kaufman had invented the entire matter. In fact, a report prepared by Barry Lando *did* exist and *was* aired on CBS on July 4, 1971.

Apparently Petitioner's sole complaint is thus with the characterization of the report as "laudatory". The report consisted primarily of an interview in which Herbert described problems he had allegedly encountered with the military. In the context of a case where the alleged defamation is an alleged implicit characterization of Herbert as a liar, it seems clear that a report devoted almost entirely to his description of his views of his difficulties with those who criticized him is plainly "laudatory". More significantly for present purposes, the Petition's failure to set forth all the facts relevant to this matter is illustrative of the problem of trying to test Herbert's assertion that he has been or will be substantially handicapped in his presentation of his case in the absence of any factual findings made in the District Court and reviewed by the Court of Appeals.

violation of what appears to be an extraordinarily altered version of the FCC's "fairness doctrine". Respondents contend that this is not the law. The Courts below have not had occasion to pass on Petitioner's theory. It is extraordinary to ask this Court to review an interlocutory discovery decision premised on such an as-yet-unevaluated theory of law, let alone one of such evident dubious merit. Whatever the merits of Herbert's theory of law, the present posture of this case thus suggests the prematurity of the Petition.

The traditional process of post-judgment review is fully adequate to protect Herbert's interests here. If, as he asserts, he has a valid claim in defamation and the effective presentation of such claim is improperly frustrated by the Court of Appeals' decision, this may be raised on a petition for review after judgment if defendants prevail below; if, on the other hand, he is not limited to the extent he claims he will be or if he were to prevail, the need for review of the matters now raised by Petitioner would be eliminated. This is not one of the "limited class of cases where denial of immediate review would render impossible any review whatsoever of an individual's claims." *United States v. Nixon*, 418 U.S. 683, 691 (1974). Compare *New York Times Co. v. United States*, 403 U.S. 713 (1971); *Nebraska Press Ass'n v. Stuart*, 423 U.S. 1327, 1328-30 (1975) (Chambers Opinion of Blackmun, J.)\*.

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\* The present posture of this case obviously contrasts with the situation where an outstanding court order compels disclosure of information by a journalist despite a claimed First Amendment privilege. In such situation the claimed privilege is irreparably lost if review is denied, at least in the absence of collateral attack through a contempt citation and appeal therefrom. No right of constitutional dimension is lost by a denial of certiorari here and even the opportunity to pursue the discovery in question here can be remedied by this Court on a review of any final judgment, if otherwise appropriate.

Quite apart from the interlocutory nature of the case, this is an inappropriate vehicle for review of the question of the impact of the First Amendment on the protection of the editorial process in the course of discovery in a libel case. The decision of the Court of Appeals—as that of the District Court which it reversed—was the first to consider the subject. Far from there being a conflict of decisions here, there is a total absence of learning from other courts. With respect to questions of discovery—where broad supervisory power is normally afforded the trial and lower appellate courts by this tribunal—it would seem appropriate to allow a period of time for assessment and observation of the approach adopted by the Second Circuit and any approach adopted in other circuits as they come to consider the question. *See Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 918 (1950) (Opinion of Frankfurter, J. respecting the denial of the petition for writ of certiorari). It is Respondent's submission that experience with the approach adopted by the Second Circuit will illustrate that not only is the protection afforded mandated by the First Amendment, but that that approach does afford plaintiffs an adequate opportunity to prepare and present a case for liability in a *Sullivan* context. The guidance gained from such experience would, in any event, assist this Court in assessing the desirability of any review of the issue.

## II.

### **The Court of Appeals Correctly Applied First Amendment Principles Sanctioned by This and Other Courts in Recognizing the Need for Protection of Editorial Process Decisions in Libel Cases.**

It is important to recognize what the decision below did and did not do. It did not alter or in any way purport to modify the substantive rules of libel established in *Sullivan*. Rather the Second Circuit's ruling is one of a series of decisions, albeit the first in this context, made by the district and circuit courts\* to implement the new rules of liability announced by this Court in *Sullivan* and clarified over the last decade in its decisions.\*\*

At bottom, Herbert's challenge to the decision of the Court of Appeals rests on two basic premises: that the decision of this Court in *Sullivan* resolved all questions involving the interplay of libel law and the First Amendment; and, perhaps as a corollary, that decisions of this Court, such as *Tornillo*, shed no light whatever on First Amendment concerns affecting libel suits. The Court of Appeals rejected the first premise, as have many courts

\* *See, e.g., Cervantes v. Time, Inc.*, 464 F.2d 986 (8th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973) [discovery—confidential source]; *Washington Post Co. v. Keogh*, 365 F.2d 965, 967-68 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1011 (1967) [summary judgment]; *Buckley v. New York Post Corp.*, 373 F.2d 175, 183-84 (2d Cir. 1967) [forum non conveniens]; *Guitar v. Westinghouse Electric Corp.*, 396 F.Supp. 1042 (S.D.N.Y. 1975) [summary judgment]; *cf. Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Board*, 542 F.2d 1076 (9th Cir. 1976), *cert. denied*, 430 U.S. 940 (1977) [pleading requirements where First Amendment rights involved].

\*\* *Curtis Pub. Co. v. Butts*, 388 U.S. 130 (1967); *St. Amant v. Thompson*, 390 U.S. 727 (1968); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Time, Inc. v. Firestone*, 424 U.S. 448 (1976).

before it,\* and found the second to be an improperly crabbed reading of significant decisions of this Court. Respondents submit that the Court of Appeals was correct on both counts.

The specific rule of liability announced in *Sullivan* was adopted to protect "robust debate" and to avoid "damp[en] the vigor" "of public debate." 376 U.S. at 270, 279. But protection against ultimate liability alone cannot avoid the potentially inhibiting effect which various aspects of litigation can themselves create. This Court has itself recognized the potential burden which pre-trial discovery can pose even in a context unaffected with any First Amendment interest. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 741 (1975).

In the libel field itself, the Court of Appeals for the District of Columbia Circuit has observed:

"One of the purposes of the [*Sullivan*] principle, in addition to protecting persons from being cast in damages in libel suits filed by public officials, is to prevent persons from being discouraged in the full and free exercise of their First Amendment rights with respect to the conduct of their government." *Washington Post Co. v. Keogh*, *supra*, 365 F.2d at 968.

In *Keogh*, summary judgment was held to be a particularly appropriate manner of dealing with groundless libel suits since the mere pendency of litigation by a public official (or public figure) may have a chilling effect.\*\* In the

\* See cases cited in footnote\*, p. 13, *supra*.

\*\* See also, *Guitar v. Westinghouse Electric Corp.*, *supra*, 396 F.Supp. at 1053 ["summary judgment is the rule, and not the exception, in defamation cases" (emphasis in original)]; *Grant v. Esquire, Inc.*, 367 F.Supp. 876, 881 (S.D.N.Y. 1973) [public figure plaintiff must "make a far more persuasive showing than required of an ordinary litigant in order to defeat a defense motion for summary judgment."]

present case the Court of Appeals for the Second Circuit has recognized that intrusive pre-trial discovery into the editorial process may well have a similar chilling impact, quite without regard to the merits of the underlying claim.

The significance of the press' interest in protection of its editorial process has been recognized by this Court in cases as diverse as *Tornillo* and *CBS*. The District Court found, and Herbert has consistently argued, that such cases had "nothing to do" with the proper bounds of libel discovery or, as Petitioner contends, with libel cases generally. It was not our contention below, and it is not our contention here, that those cases in any way alter principles of liability in libel cases. Rather, we do contend that *Tornillo* and *CBS* articulate sweeping First Amendment protection for editorial process decisions of the press and thus surely bear upon whether compelled disclosure of just those decisions may be countenanced.

The Petition wrongly asserts that the decision below interpreted *Tornillo* and *CBS* as holding that the exercise of editorial judgment was immune from post-publication scrutiny (Pet. 16). Having erected this strawman,\* the

\* The Petition seeks to erect a similar strawman in inferring (Pet. 13-14) that Judge Kaufman read this Court's opinion in *Branzburg v. Hayes*, 408 U.S. 665 (1972), as creating an absolute privilege against disclosure of a confidential source. Judge Kaufman's opinion, of course, does not so hold. It relies on *Branzburg* primarily for its recognition that newsgathering, like the processes of dissemination and editorial production he elsewhere discusses, is entitled to a significant degree of First Amendment protection. See opinion at Pet. 8a. As to this, there was no dispute in *Branzburg*, see 408 U.S. at 681; and, in agreement on this point, see 408 U.S. at 728 (Stewart, J., dissenting). Judge Kaufman also refers to the privilege which has frequently been held to arise in situations not involving the question—raised by *Branzburg*—of whether a journalist must appear before a grand jury with respect to his witnessing of a crime. In other cases, generally involving civil litigation, a First Amendment privilege has often been applied to protect journalists from being required to divulge their confiden-

Petition purports to demonstrate that even after these decisions, the press may be subject to judgment for libel. Neither Respondents nor the Court below in any way dispute this point. Rather, it is our contention, and the Court below held, that these decisions reflect a concern for the protection of the editorial process and an intention to shield it against governmental intrusion; the product of that process—the allegedly defamatory publication—remains a subject for liability, and a variety of means of proof exists to establish the actual malice required by *Sullivan* without resort to the compelled disclosure of the editorial process itself.

In the present case, for example, Herbert already has been provided with an enormous—“staggering”, in Judge Kaufman’s language (Pet. 19a)—amount of material and information. If there were actual malice here, surely these materials of this scope and nature\* should reflect an objective manifestation of the actual knowledge of falsity or reckless disregard for the truth. In that respect, it has been recognized, in contexts far removed from any discussion of the editorial privilege, that notwithstanding the sub-

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tial sources. See, e.g., *Cervantes v. Time, Inc.*, *supra*; *Baker v. F&F Investment*, 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973); see generally Goodale, *Branzburg v. Hayes and the Developing Qualified Privilege*, 26 Hastings L.J. 709 (1975).

\* “Lando answered innumerable questions about what he knew, or had seen; whom he interviewed; intimate details of his discussions with interviewees; and the form and frequency of his communications with sources. The exhibits produced included transcripts of his interviews; volumes of reporters notes; videotapes of interviews; and a series of drafts of the ‘60 Minutes’ telecast. Herbert also discovered the contents of pre-telecast conversations between Lando and Wallace as well as reactions to documents considered by both. In fact, our close examination of the twenty-six volumes of Lando’s testimony reveals a degree of helpfulness and cooperation between the parties and counsel that is to be commended in a day when procedural skirmishing is the norm.” (footnote omitted) (Pet. 19a) (Opinion of Kaufman, C.J.)

jective nature of the actual malice test, such state of mind “is ordinarily inferred from *objective facts*”, *Washington Post Co. v. Keogh*, *supra*, 365 F.2d at 967-68 (emphasis added), and this is true in the vast majority of cases where “state of mind” is relevant, including the great bulk of criminal cases where the Fifth Amendment stands as a barrier to direct inquiry.\*

There is simply no reason to believe that those libel plaintiffs who would have been able to demonstrate actual malice in the past will be prevented from doing so under the approach adopted by the Court of Appeals; on the other hand, the unacceptable threat to robust debate which intrusive discovery into the editorial process creates will be avoided by that approach.

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\* The Petition makes much of the alleged choice the press will have in shaping the evidence on state of mind at trial (Pet. 19). Obviously the objective evidence of what information was possessed, who was spoken to, what was said and what was published is of the greatest import. That evidence and more has all been supplied in this case and there is no issue concerning it.

To the extent Herbert’s objection focuses on the ability of journalists to testify as to their state of mind after invoking the privilege to limit discovery, this is a matter not addressed by the decision. It is precisely the type of question which properly ought to be considered by the courts below as they work out rules defining and governing the privilege.

Similarly, the Petition’s claim (Pet. 21-23) as to the uncertainties created by the rule, apart from being enormously overstated, simply reflects the desirability for trial and circuit court consideration of the issues which frequently attend a decision in a case of first impression.

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Dated: New York, New York  
February 22, 1978

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MAR 1 1978

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1977

No. 77-1105

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ANTHONY HERBERT,

*Petitioner,*

—against—

BARRY LANDO, MIKE WALLACE, COLUMBIA BROADCASTING  
SYSTEM, INC., ATLANTIC MONTHLY COMPANY,

*Defendants,*

BARRY LANDO, MIKE WALLACE and CBS INC.,

*Respondents.*

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**REPLY BRIEF OF PETITIONER**

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**REPLY BRIEF OF PETITIONER**

Pursuant to Rule 24 Sub.Div. 4, U.S.C.C. Rules, Petitioner respectfully submits this reply brief in connection with the argument first raised in the brief of respondents that the Petition should be denied because the matter is not ripe for review by this Court.

In support of their position respondents argue that other judicial considerations of the same issue should be allowed to develop prior to this Court's review. (Reply Br. p. 12) Such considerations as have been given to the Court of Appeals decision by other courts underline the appropriateness of review by this Court at this time. In *Jenoff v. Hearst*, No. H475-962 (D. Md. 1978).<sup>\*</sup> Judge

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<sup>\*</sup> Transcript of oral opinion, January 20, 1978, pp. 6-7.

Alexander Harvey II stated his disagreement with Chief Judge Kaufman's opinion and noted his support of Judge Meskill's analysis:

Finally, let me say that if this case did squarely present the question as to whether *Herbert* should apply, my answer would be no. A careful reading of the *Herbert* opinion and of the District Court's opinion indicate that this is an extremely unique doctrine carved out of the whole cloth by Chief Judge Kaufman of the Second Circuit, and not even entirely agreed upon by the concurring judge, Judge Oakes. So at this juncture, two Federal Judges in New York recognize such a privilege but in different ways, and two do not. The Supreme Court cases cited in *Herbert v. Lando* do not, in my opinion, recognize any such privilege in a case of this sort.

I would agree completely with the dissent of Circuit Judge Meskill, and he sums up his position at the outset in the following language:

In this action, Anthony Herbert alleges that he has been libeled by Barry Lando, Mike Wallace, C.B.S. and Atlantic Monthly. Under *New York Times v. Sullivan*, 376 U.S. 254 (1964), he may prevail if he proves that the defendants acted with "actual malice," that is, knowing or reckless disregard of the truth. The major purpose of this lawsuit, therefore, is to expose the defendants' subjective state of mind—their thoughts, beliefs, opinions, intentions, motives and conclusions—to the light of judicial review. Obviously, such a review has a "chilling" or deterrent effect. It is supposed to. The publication of lies should be discouraged. The discovery by a libel plaintiff of an editor's state of mind will not chill First Amendment activity to any greater extent than it

is already being chilled as a result of the very review permitted by *New York Times v. Sullivan*. The majority's attempt to eliminate or reduce that chill is supportable in neither precedent nor logic.

Thus, if it were necessary here to decide the question, \* \* \* I would not apply the rule stated in the *Herbert* case.

Neither the fact that the decision below resulted in a remand to evaluate the open questions in light of the absolute privilege of non-disclosure of editorial judgment created by the Court of Appeals (Reply Br. p. 9) nor the usual broad powers of the lower court over discovery matters militates against review at this time. The inapplicability of these factors to the present need for review is indicated in the argument pressed by respondents themselves before the Court of Appeals in their Petition for Leave to Appeal to that court:

This case comes to this Court in a particularly appropriate context for certification of an interlocutory appeal. The decision below is one of "first impression." (Op. at 2) Although it is a ruling on a Rule 37 motion, it does not involve the commonplace exercise of discretion by a District Court in weighing on a question by question basis competing considerations of, for example, relevance and burdensomeness; nor is it one of a series of rulings as to the scope of a recognized—or previously rejected—privilege; it is, instead, a broadly phrased ruling that as a matter of law in cases governed by *Sullivan*, "liberal" discovery *must* be permitted into the editorial decisionmaking process of the press.\*

\* Petition for Leave to Appeal from an Interlocutory Order, March 4, 1977, p. 6.

The same analysis is applicable to the broadly phrased ruling of the Court of Appeals that as a matter of law in cases governed by *Sullivan* discovery cannot be permitted "into the editorial decision-making process of the press."

Respondents further urged in their earlier Petition below, in words even more applicable to the present decision of the Court of Appeals:

In any event, the decision will undoubtedly affect every *Sullivan* case and there is surely little reason to doubt the judgment of the National News Council that the issues dealt with within the opinion are "of major portent for the press, the law and the public at large." (New York Times, January 27, 1977, p. 22, col. 2, at col. 4).\*

In *Reliance Insurance Company v. Barron's*, 76 Civ. 4094-CLB (S.D.N.Y. Nov. 18, 1977),\*\* Judge Charles L. Brieant, in adhering to the District Court's grant of summary judgment upon reargument, described the impact upon *Sullivan* plaintiffs of the decision below:

\* \* \* since *Herbert*, defendants in defamation actions may not even be examined under oath before trial as to how they "formulated [their] judgments" (Slip op. at 232). If not before trial, then not at trial, since the same reasoning used in *Herbert* with respect to pre-trial testimony must in logic apply to testimony at trial.

\* \* \*

In light of *Herbert*, and in view of the recent denial by the Supreme Court of *certiorari* in *Hotchner v. Castillo-Puche*, 551 F.2d 910 (2d Cir.), *cert. denied*, 46 U.S.L.W. 3202 (October 4, 1977), practical litigants may

\* *Ibid.*, at pp. 6-7.

\*\* Unofficially reported at 3 Med. L.Reptr. 1591.

well conclude that any remedy for libel against a journalist by a public figure is now illusory.

A judicial remedy for defamation was regarded, since the earliest days of the common law, as necessary because of the "supposed tendency [of libel] to arouse angry passion, provoke revenge and thus endanger the public peace." *Regina v. Holbrook*, 4 Q.B.D. 42, 46 (1878). Are men and women of honor who happen to be public figures to right vicious slanders hereafter by resort to fisticuffs or duelling? *Naturam expellas furca, usque tamen recurret*. Horace, *Epistles* I, 10.\*

## CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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\* Compare respondents' statement in their brief (p. 12) that experience with the approach of the Court of Appeals will illustrate "that that approach does afford plaintiffs an adequate opportunity to prepare and present a case for liability in a *Sullivan* context."

Supreme Court, U. S.  
**FILED**

MAY 31 1978

MICHAEL RODAK, JR., CLERK

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ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SECOND CIRCUIT

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**BRIEF FOR PETITIONER**

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### ARGUMENT

#### POINT I

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1977

No. 77-1105

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ANTHONY HERBERT,

*Petitioner,*

—against—

BARRY LANDO, MIKE WALLACE, COLUMBIA BROADCASTING  
SYSTEM, INC., ATLANTIC MONTHLY COMPANY,

*Defendants,*

BARRY LANDO, MIKE WALLACE and CBS INC.,

*Respondents.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SECOND CIRCUIT

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**BRIEF FOR PETITIONER**

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**Opinions Below**

The opinions of the Court of Appeals for the Second Circuit are reported at 568 F.2d 974 (2nd Cir. 1977) and are reproduced in Appendix A to the Petition for Writ of Certiorari (P 1a-52a).<sup>\*</sup> The opinion and order of the Dis-

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<sup>\*</sup>Page references preceded by a "P" and followed by an "a" refer to pages of the Appendix to the Petition for Writ of Certiorari which contains all the opinions below. References through-

trict Court denying defendants' motion to restrict discovery is reported at 73 F.R.D. 387 (S.D.N.Y. 1977) and is reproduced in Appendix B to the Petition (P 53a-89a). The opinion and order of the District Court certifying its prior opinion and order is unreported and is reproduced in Appendix C to the Petition (P 90a-98a).

### Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on November 7, 1977. Petition for Writ of Certiorari was filed on February 6, 1978, and this Court granted review on March 20, 1978.\* The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

### Constitutional Provision Involved

The First Amendment to the United States Constitution provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

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out to the Appendix filed with this brief will appear by number followed by an "a". References to deposition transcripts contained in the Supplemental Record on Appeal will be described by page numbers preceded by "L" for defendant Lando and "W" for defendant Wallace. The designation "Ex." followed by a number refers to exhibits marked at the deposition of defendant Lando, which are contained in the Supplemental Record on Appeal as part of document 67. The Lando deposition transcripts are documents 67-91 of the Supplemental Record on Appeal; the Wallace transcripts are documents 94-96 of that Record.

\* By letter of the Clerk of this Court dated March 29, 1978, petitioner's time to file his brief and appendix was extended to May 31, 1978.

### Questions Presented

Whether creation for libel defendants of an absolute privilege not to disclose the editorial process has undermined the balance previously struck by this Court in *New York Times v. Sullivan*, 376 U.S. 254 (1964), and its progeny between competing social interests in the First Amendment and in the individual's right of legal redress for malicious damage to reputation?

Whether the creation of an absolute privilege of nondisclosure of the editorial process has effectively eliminated the possibility of proving liability for the calculated or reckless falsehood which the *Sullivan* principles had concluded was not entitled to any constitutional protection?

Whether the immunization of the editorial process has removed that area of media activity not only from defamation cases but also from suits involving media liability under statutes of general application?

Whether decisions of this Court concerning governmental conduct seeking to control what shall or shall not be printed are determinative of the level of First Amendment protections to be afforded disclosure of the editorial process in a post-publication *Sullivan* libel case?

Whether court decisions involving disclosure of confidential sources support the creation of a privilege of nondisclosure of editorial process in a libel action?

Whether there is a special First Amendment position occupied by the institutional press justifying the immunization of its editorial process from judicial scrutiny?

### Statement of the Case

Petitioner, Anthony Herbert ("Herbert"), a retired United States Army Lieutenant Colonel, brought this defamation action under 28 U.S.C. §1332 against respondents ("defendants") and Atlantic Monthly Company for a broadcast entitled "The Selling of Colonel Herbert," presented by CBS on its 60 MINUTES Program ("Program") and produced by Mike Wallace and Barry Lando, and an article published by Atlantic Monthly and written by Lando. Herbert's present appeal is from a judgment of the United States Court of Appeals for the Second Circuit which reversed and remanded a discovery order of the United States District Court for the Southern District of New York and which created for defendants in libel actions governed by the principles of *Sullivan* an absolute privilege to bar disclosure of the editorial process.

### The Pleadings

The complaint (8a-88a) alleges that Herbert enlisted in the U.S. Army at the age of 17 and rose through the ranks to Lieutenant Colonel. He spent 24 years in military service, and gained the highest professional reputation among his fellow soldiers and officers, as well as among the general public. He was the recipient of many awards and citations and during the 1950's toured much of the world on behalf of the United States Army. From September, 1968 to April, 1969, Herbert served with the 173rd Airborne Brigade in Vietnam. While in Vietnam, Herbert reported to his superior officers atrocities committed and permitted by United States forces in violation of international law and military regulations. On April 4, 1969, Herbert was relieved as Commander of the 2nd Battalion and given a bad efficiency report. After his relief from command, Herbert attempted to process charges against his superior officers, General John W. Barnes and Colonel J. Ross

Franklin, for failing to act upon his reports and complaints and for covering up the charged atrocities. After months without any indication of action, Herbert filed a formal complaint with the Inspector General's Office against Franklin and Barnes. In March of 1971, Herbert brought formal charges at the U.S. Army Criminal Investigation Division (CID). Television and newspaper publicity regarding these charges followed. The Army conducted an investigation resulting in the dismissal of the charges. Ultimately, the Army itself conceded that 7 of the 8 incidents which Herbert charged his superiors had covered up did occur in the 173rd area of operations.

On February 4, 1973, CBS presented "The Selling of Colonel Herbert" as a factual report of a 60 MINUTES investigation into the validity of Herbert's charges. The complaint alleges that the Program falsely and maliciously depicted Herbert as a liar in his assertions that he had reported many atrocities to Col. Franklin or General Barnes, as a man capable of brutality to Vietnamese prisoners, and as a person who had used the war crimes charges as an excuse for his relief from command and who had perpetrated a hoax upon the American public. As a result of the Program, Herbert's reputation and good name were destroyed and he sustained severe financial losses.

The answers of defendants raised several affirmative defenses including that the Program was believed by them to be true, a fair and accurate report of public and official proceedings and published in good faith, without malice, and that the Program was privileged under the First and Fourteenth Amendments to the United States Constitution (93a, 107a, 122a). Defendant Lando's answer also alleges as an affirmative defense a privilege regarding the contents of the Atlantic Monthly article because it was necessary and appropriate to defend his reputation against unspecified statements made by plaintiff (108a, 123a).

## Discovery

Confronted with the representation on the Program that CBS' report was the result of an investigation in which defendant Lando interviewed "scores of people" over the course of a year (42a), Herbert undertook to discover what defendants did in the course of that investigation, what they were told or learned and what conclusions they came to or beliefs they entertained as to these matters. Fundamental issues currently before this Court arose out of disputes concerning Herbert's discovery efforts in the last area of inquiry.\*

## The Majority Decision Below

The opinion of Chief Judge Kaufman proceeded from an analysis that divided the functions of the press into three parts. He found the first function—acquiring information—protected by *Branzburg v. Hayes*, 408 U.S. 655 (1972) and the third function—dissemination of the information—protected against prior restraints by a line of cases beginning with *Near v. Minnesota*, 283 U.S. 697 (1931) (P 4a-8a). He found the second function—processing the information—as embodying the editorial process which had been granted protection in "unequivocal" terms by *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (P 9a). The Chief Judge concluded that the answers sought by the disputed questions "strike to the heart of the vital human component of the editorial process". He determined that, faced with the possibility of "such an inquisition", the editorial process would be chilled and the very values which

\* Even the discovery conducted in the other areas has not been free from difficulty. Certain documents were only produced during the course of the depositions; certain interview notes and documents were never produced, based upon the claims that they could not be located or were never prepared (see e.g.: L 77, L 87, L 354, L 482, L 1098); one document was first disclosed only during oral argument before the District Court (163a); and notes of specific conferences between defendants and U.S. Army officials at the Pentagon were never produced.

the *Sullivan* decision sought to safeguard would be consumed (P 22a).

The Chief Judge's opinion never considered the values reflected in the historic right of legal redress for damage to reputation or the effort of *Sullivan* and its progeny to accommodate that right with First Amendment concerns. Nor did the opinion consider the critical distinction drawn by the decisions of this Court between different types of state action—e.g.: prior restraints, criminal sanctions, contempts, civil damage actions for defamation after publication—in determining whether First Amendment rights have been violated. The opinion ignored the reluctance of this Court to create a conditional constitutional privilege of nondisclosure of sources in *Branzburg* while citing that decision in support of the creation of an absolute constitutional privilege of nondisclosure of matters concededly in issue in a *Sullivan* libel action. Finally, the opinion assumed that inquiry regarding the defendant's state of mind would chill the desired robust debate on public issues, without any consideration of whether the resulting protection from liability for deliberate liars and those who have serious doubts about the truth of what they say threatens to subvert, rather than enhance, that debate.

In his concurring opinion, Judge Oakes reached the same conclusion as Chief Judge Kaufman "not on First Amendment grounds generally, but in light of what seems to be the Supreme Court's evolving recognition of the special status of the press" (27a). Judge Oakes relied for his conclusion upon a 1974 speech given by Mr. Justice Stewart at Yale Law School and the trends expressed in the decisions of this Court in *Tornillo* and *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973) (P 27a-32a). Judge Oakes proceeded to review what he regarded as the appropriate level of protection for the editorial process in light of the interest of insuring the institutional freedom of the press. He rejected the approach of Judge Haight that *Sullivan*, having struck the

appropriate balance, permitted a plaintiff discovery coterminous with the substantive constitutional law of libel. He found that the *Sullivan* court did not deal with the method of proving actual malice but was involved only in setting forth substantive rules (P 39a-41a). He concluded that to permit discovery of the editorial process would increase "the level of chilling effect" in a way not contemplated by *Sullivan* (P 42a). Finally, Judge Oakes rejected the lower court's position because it failed to acknowledge the special status which the free press guarantee accords to the editorial process (P 43a). Judge Oakes also considered and rejected a compromise approach similar to that which he found had developed in the area of confidential source disclosure, concluding that disclosure of the editorial process in any case would create an unconstitutional chill (P 43a-44a).

As with the Chief Judge's opinion, Judge Oakes' opinion reflected no consideration of either the values embodied in the right of legal redress for damages to reputation or the efforts of *Sullivan* and its progeny to accommodate serious competing social interests. Judge Oakes avoided the critical distinctions arising from different types of state action by treating the discovery sought herein as a prior restraint on publication (P 35a-36a). Judge Oakes also found the absolute privilege of nondisclosure to be a procedural rule not affecting a change in the substantive law of constitutional libel (P 36a, 39a-40a, n.28) and apparently treated the state of mind questions as involving common law malice rather than actual malice (P 41a, n.31).\*

\* Chief Judge Kaufman's description of the factual setting of this case (P 13a-17a) did not focus on the specific factual areas which gave rise to the state of mind questions. No effort was made to examine the materials discovered and the matters presented on the Program to ascertain whether the disputed questions were directed to defendants' state of mind as to the truth or falsity of published matters or of materials pertaining to those matters. The Chief Judge's description of the Program itself (P 17a-18a), the underlying facts and the course of discovery (P 13a-19a) is in-

### The State of Mind Questions

The questions concerning defendants' state of mind which were the subject of objection at the depositions and of the absolute privilege created by the Court of Appeals related to matters presented on the Program and conflicting or impeaching matters not presented. These questions sought to ascertain whether Lando was subjectively aware of the probable falsity of statements presented on the broadcast by directly ascertaining Lando's state of mind on these matters.\*

The effect and importance of the decision below is illustrated by an examination of certain specific matters presented on the Program, conflicting and contradictory facts concerning those matters disclosed during discovery, and questions involving those matters which defendants refused to answer.

### Herbert as a Person Capable of Brutality

Prior to the presentation of the Program, Lando had obtained or seen a filmed statement by Cpt. Grimshaw, one of Herbert's company commanders, that Herbert warned him never to have his command involved in any atrocities (Ex. 125, pp. 17, 19; Ex. 60, pp. 44-45); a sworn statement by Cpt. Dorney, another of Herbert's company commanders, that he was constantly being reminded by

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accurate. While these inaccuracies are not relevant at this stage, the complete failure to analyze the factual framework of the disputed questions can only be explained by the manner in which the majority below chose to approach the appeal (P 11a, n.14; P 25a).

\* The Courts below described the inquiries regarding defendants' state of mind as falling within five categories (see P 19a-20a; P 57a-58a). Lando also objected to state of mind questions involving the period after the Program but before the publication of the Atlantic Monthly Article. See, e.g.: L 2085, 1.23 (whether Lando had come to the conclusion during that period that a Cpt. Bill Hill was reasonably sure that Franklin was in Vietnam on February 14).

Herbert to watch out for the safety of the civilian population (Ex. 53; Ex. 50, p. 491); Sgt. Warden's statement that an angry Herbert had spoken to an entire Company condemning the murder of Vietnamese detainees on February 14, 1969 at Cu Loi (Ex. 144; L 2094, L 2095); sworn statements by Brigade Surgeon Laurence Potter and by Battalion Surgeon Tally regarding Herbert's concern for good medical care and treatment of the Vietnamese population (Ex. 51, p. 2; Ex. 52; Ex 50, pp. 483-486; L 877-878); helicopter pilot Kahili's statement about Herbert's briefing to pilots not to shoot Vietnamese civilians or detainees and describing Herbert's humane treatment of the Vietnamese (Ex. 21, p. 7; L 204; Ex. 48; L 875).

None of these statements was quoted, presented or referred to on the Program. Instead, the Program presented a filmed statement by General Barnes that "[Herbert] was a killer" (43a) and a comment by Wallace that there are men "who claim that Herbert was an officer who could be brutal with captured enemy prisoners himself" (53a). Wallace proceeded to present or describe statements from three soldiers, Mike Plantz, Bob Stemmies and Bruce Potter, painting a picture of Herbert as a brutal man (53a-55a). During discovery it was disclosed (a) that Plantz' story was not supported in any manner by anyone and that a number of people had advised Lando that Plantz could not be trusted and had it in for Herbert (L 569, L 570, L 257, L 371-372, L 575, L 583-584); (b) that Lando had specifically noted that Stemmies' story had to be checked regarding whether Herbert had actually witnessed the beating involved, but he never spoke with Stemmies again and another soldier in the Brigade subsequently indicated to Lando that Herbert could not have seen the beating (L 917; Ex. 13, p. 7); and (c) that Lando lacked any corroboration whatever of any aspect of Bruce Potter's story.

Having discovered these facts, plaintiff then asked Lando at his deposition questions concerning his conclusions, bases and intentions for pursuing, presenting and endors-

ing statements portraying Herbert as a brutal man, insensitive to the atrocities committed against the Vietnamese, while ignoring and excluding all statements describing Herbert as concerned about the treatment of the Vietnamese population and outraged about atrocities. For example, questions which were objected to included: whether Lando concluded it was unnecessary to talk to Capt. Laurence Potter (L 666, L 20); the basis of including in the Program a statement by Plantz regarding Herbert's treatment of the Vietnamese and not including a statement by Kahili on the same subject (L 876, L 19); the basis on which Lando did not include in the Program the statements of Cpt. Potter or Major Talley or Cpt. Dorney (L 878, L 19); whether by not including Cpt. Grimshaw's filmed statement that Herbert cautioned him not to get himself or his command involved in incidents like the February 14th incident, Lando intended to influence the impression created by the Program as to whether Herbert was concerned about war crimes or atrocities while he was in Vietnam (L 1790, L 17); whether Lando had concluded that Herbert's advice to one of his company commanders not to ever get involved in an atrocity was not important on the question of Herbert's concern about war crimes while in Vietnam (L 1791, L 21); whether Lando had proposed including any statement on the Program that some soldiers in the Brigade said Herbert showed care and consideration for the treatment of Vietnamese prisoners (L 877, L 112).\*

These unanswered questions become even more significant to plaintiff's effort to discover evidence that would satisfy his heavy burden of proof of actual malice when they are viewed within the context of two statements made by defendant Wallace. A month prior to the Program,

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\* While the Program never hints that CBS' investigation uncovered anything showing Herbert's consideration for the treatment of Vietnamese prisoners or his activities condemning atrocities, Wallace noted on the Program that several men said "it's not so" in reference to the claim that Herbert himself could be brutal with captured enemy prisoners (53a).

Wallace, at the Pentagon and in front of one of its officers, suggested to Lando that the Program should attempt to portray Herbert as a brutal man.\* More than three years later, at a deposition in this action, Wallace conceded that he had the impression, before the Program was aired, that Herbert had warned men in his command against the commission of atrocities (W 148-149). Within the context of matters plaintiff had discovered regarding the nature of defendants' "investigation", and what they had learned and heard during that "investigation", plaintiff was seeking by the disputed questions direct proof of the critical issue of whether CBS and its producers Lando and Wallace entertained serious doubts or deliberately lied concerning the truth of matters stated and presented on the Program picturing Herbert as a brutal man.

#### **Herbert's Reporting of War Crimes**

During discovery plaintiff for the first time became aware that CBS had had in its possession before the Program was aired two sworn statements given by Captain Jack Donovan, one of Herbert's staff officers, which stated that Donovan was certain Herbert had complained of the Cu Loi killings to Brigade Headquarters (Ex. 83 and 84). In the first statement Donovan swore he was certain the report by Herbert was made to Franklin; in the second statement, given after the Army CID called him back, Donovan stated he could not be absolutely certain it was Franklin to whom Herbert was talking, but believed it to be him. In both statements Donovan was unequivocal that he heard Herbert complain at Brigade Headquarters of

\* Wallace stated: "Ideally, if we can get somebody on the film to say 'I don't know whether he [Herbert] reported but he is capable of doing that sort of thing himself.'" This conversation was tape-recorded by the Pentagon and produced as Ex. A-7 by the Department of Army at the deposition of its Information Officer, Col. Leonard Reed, in this action. Other exhibits produced at the Reed deposition are referred to herein as "Ex." followed by the prefix "A-" and the exhibit number. *Also see:* W 25.

the Cu Loi killings to a Brigade officer. In a second filmed interview conducted by Lando, Col. Franklin admitted that he could not explain the Donovan statements (Ex. 102, p. 13). In that interview Franklin admitted he frequently would "tune-out, turn-off" when Herbert was talking and that it was certainly possible that Herbert could have made comments criticizing the ARVN (the South Vietnam Army) or American advisors about the mistreatment of the Vietnamese (Ex. 102, pp. 2, 8).\*

On the Program, nothing from Franklin's second interview was noted or excerpted;\*\* rather, the Program presented from Franklin's first interview his assertion that Herbert never discussed war crimes or atrocities with him (45a). Similarly, nothing on the Program even remotely implied that defendants had any statements of anyone who heard Herbert report the Cu Loi killings to Brigade Headquarters; to the contrary, Wallace specifically stated on the Program that none of the men who served under Herbert in Vietnam "were certain that he had actually reported" the February 14th killings (48a).

Plaintiff sought to obtain direct evidence of defendants' state of mind as to the truth or falsity of these matters concerning Herbert's reporting of war crimes which either appeared on the Program or contradicted material which was broadcast by inquiring as to Lando's conclusions regarding Franklin's second interview, particularly in reference to matters presented on the Program (L 1486, 1.12; L 1525, 1.18; L 1526; 1.17; L 1530, 1.22); his view of Franklin's veracity and credibility (L 2888, 1.18; L 2889, 11.5 and

\* The February 14 killings at Cu Loi involved South Vietnamese forces accompanied by an American advisor.

\*\* Apparently, the Program's viewers were not the only ones deprived of all information concerning the second interview. At his deposition Wallace testified that he did not recall knowing about a second Franklin interview prior to the institution of this action (W 89-90). Herbert knew nothing of this interview until it was disclosed during discovery.

16), and his intentions in excluding from the Program any reference to the Donovan statements (L 1138, l.18; L 1139, l.2; L 1139, l.10).

**The Role of the Department of the Army in the Preparation of the Program**

During discovery plaintiff also learned of extensive co-operation between the defendants and the Pentagon in the preparation for the Program. It was disclosed, for example, that when CBS sought the Army's assistance in locating people to be interviewed, Pentagon and other Army officers spoke to active-duty men and urged them to cooperate with CBS' interview requests. Lando also admitted his knowledge of the Pentagon's extensive animosity toward Herbert which had even included the organizing of an anti-Herbert "briefing team" which toured Army bases during 1972 (L 521, L 2012-2013, L 2015). During the deposition of Col. Reed, an Army Memorandum was produced describing the Army's Information Office as "assisting CBS in the production of this program", and stating that "the thrust of this program will be to point out that much of what Herbert has printed in his book is fiction rather than fact" (Ex. A-8).

Moreover, during the pendency of the Rule 37 motion and the ensuing appeals, Herbert, in a Freedom of Information Act suit,\* ascertained that prior to CBS developing its "investigation," Lando told the Pentagon's Information Officer that Lando's premise was that Herbert was a liar and that there would be no story if Herbert's

\* The suit was instituted in the District Court for the District of Columbia to obtain unexcised copies of certain documents. (*Herbert v. Department of the Army*, D.C.C., Civ. Action No. 77-0155). The three documents which are described herein were produced and filed by the United States Attorney in that proceeding. These documents were annexed as Exhibits I, II and III to the Brief of Plaintiff-Appellee before the Court of Appeals and are similarly annexed to this Brief. Judge Oakes refers to these documents at P 40a-41a, and n.30.

account could not be "debunked" (Ex. I). Thereafter, at the time of his first interview with Franklin in the Pentagon, Lando repeated his interest in debunking Herbert and further told the Information Officer that Wallace "is equally convinced that the story is in debunking Herbert" and that the story "will not go unless he can convincingly portray Herbert as the bad guy" (Ex. II). Lando later stated to General Sidle of the Pentagon Information Office that his "piece is aimed at debunking Herbert in his long fight against the Army" (Ex. III). These conversations were not disclosed by either Lando or Col. Reed at their depositions.

The Army's relationship to the preparation of the Program and its activities regarding Herbert were disregarded on the Program except for a denial by Cpt. Grimshaw that he was under any pressure from Pentagon representatives to appear at the Pentagon for a CBS interview.\* Again, in an attempt to obtain direct evidence as to Lando's state of mind regarding the truth or falsity of materials presented on or contrary materials excluded from the Program, plaintiff inquired of Lando as to his consideration of, or belief concerning the impact of, including a reference in the Program to Army activities regarding Herbert's charges (L 523, l.20; L 525, l.12), his conclusions as to Army activities regarding the preparation of the Program (L 1900, l.17; L 2014, l.8; L 2013, ll.8 and 21) or regarding Herbert's charges of war crimes (L 2453, l.5; L 2454, l.8); his views of the veracity of Pentagon representatives (L 2891, ll.6 and 13), his intention in excluding from the Program any reference by Grimshaw to his discussions with Pentagon officers or to feeling any pressure to support the Army's position (L 1905, l.23; L 1907, l.15).

\* Grimshaw also stated at his interviews that he knew that there were people at the Pentagon who even then "do not like" what he had previously said in support of Herbert (Ex. A-7), and that he felt some pressure from having been told by another major he was "dead careerwise" because Herbert had published in his book a Grimshaw statement supporting Herbert (Ex. 60, pp. 85-86).

### State of Mind Questions Answered by Defendants Without Objection.

Inquiry into the area of state of mind did not uniformly provoke objections by defendants on the basis of a threat to freedom of the press or an attack on a privileged activity of editorial judgment. Indeed, defendants answered a number of questions which clearly come within one or another of the five categories of inquiries which defendants ultimately claimed were privileged from discovery. For example, Lando testified to: defendants' thoughts in deciding not to have a final interview of James Wooten, a New York Times correspondent who collaborated with Herbert in the writing of Herbert's book "Soldier" (L 125-126); Lando's proposals, and his discussions with Wallace, as to whether to include in the Program a comment concerning the fact that Col. Franklin was subsequently relieved from command after a Vietnamese body had been dropped on a command post by soldiers under his command (L 164-165, L 302-305); his conclusion that it was a "toss-up" as to whether the reduced rate on the Hotel Ilikai bill for February 14, 1968 indicated one-person occupancy of the room on that date or an early check-out rate (L 350-351); his conclusion that the statements of Col. Nicholson and Major Crouch as to when Mrs. Franklin departed from Hawaii were inconsistent (L 353); his having no conclusion one way or the other as to whether Donovan believed it was Franklin to whom Herbert was reporting at Brigade headquarters as described in the Donovan statements (L 1103); his discussions with Wallace and the conclusion reached by both of them as to whether the Hotel Ilikai bill had been paid in full when the final figure of the bill recited a balance due of \$25.00 (L 1321-1323).<sup>\*</sup> In addition, no objections were made to the pro-

<sup>\*</sup> Cf. Chief Judge Kaufman's statement that "Lando obtained Franklin's hotel bill and a cancelled check in payment of that bill" (P 16a). However, on the face of the two documents (Exs. 26 and 98), it is indisputable that a \$25.00 balance remained after crediting the amount of the check.

duction of any documents on the basis of any alleged invasion into the editorial process notwithstanding the presence of what now might be characterized as state of mind matter in a number of the documents.<sup>\*</sup>

### Summary of Argument

In *Sullivan* and its progeny this Court sought to accommodate the interests of the First Amendment in uninhibited, robust and wide-open debate on public issues with the historic right of legal redress for damage to reputation from defamatory falsehood. In striking the balance between these competing interests, this Court concluded that the calculated or reckless falsehood was constitutionally worthless and not deserving of any constitutional protection and declared that public officials, and, thereafter, public figures, could recover damages for defamatory falsehoods where it was proven by clear and convincing evidence that they were published with knowledge of their falsity or with reckless disregard of whether they were false or not. Reckless disregard refers to a subjective state of mind of the defendant in which he entertains serious doubts as to the truth of the publication or has a subjective awareness of its probable falsity. The libel plaintiff cannot establish reckless disregard under the *Sullivan* principles without the requisite clear and convincing proof of this state of mind.

The decision below has created an absolute privilege for nondisclosure of the editorial process which prevents plaintiffs from obtaining any direct evidence of defendant's state of mind (including conclusions, opinions, doubts, intentions) regarding either the false material

<sup>\*</sup> *E.g.*: Ex. 138, p. 2 (Lando note to "double check" with Hill his statement regarding Herbert's reporting the Cu Loi killing to Brigade); Ex. 13, p. 7 (Lando note to check with Stemmiess whether Herbert had actually witnessed a beating that Stemmiess had described).

published or the facts withheld from the final product which contradicted or cast doubt upon the published assertions. The decision also threatens to eliminate certain kinds of indirect or circumstantial evidence if they involve matters subsumed in the editorial process. Whether this privilege is labelled procedural or substantive is not the issue—its impact is to effectively prevent *Sullivan* plaintiffs from proving a critical part of their case under the reckless disregard branch of actual malice. The privilege is in conflict with legal principles that treat with great disfavor any rules that limit the full disclosure of all the facts and that prevent a party from raising a defense, on the one hand, and asserting a privilege not to disclose facts regarding that defense, on the other hand. Moreover, the privilege creates a potential anomaly because only the plaintiff, but not the defendant, would be barred from this proof.

The privilege established by the Court of Appeals has immunized an entire area of media activity—the editorial process—from judicial scrutiny at both pre-trial and trial stages of a defamation action. It has thereby removed from exposure to liability for calculated or reckless falsehood any activity arising during the editorial process, a term which, by its very nature, is difficult to define. Such a privilege may reach far beyond the field of defamation to immunize the editorial process from judicial scrutiny in areas where the media have traditionally been subject to statutes of general application.

The creation of an absolute privilege for editorial judgment is not supported by this Court's decisions concerning governmental attempts to control what shall or shall not be printed. The nature of the state action, and not the particular media function as such, will normally determine the level of protection required to secure First Amendment rights. *Sullivan* and its progeny have defined the level of protection required where the state action is a post-publication defamation suit for damages.

The confidential source cases do not create a privilege of nondisclosure in libel actions. The First Amendment concerns implicated in discovery matters can be and are properly addressed without the creation of any privilege of nondisclosure.

Creating a privilege for the editorial process grounded upon a structural analysis of the Press Clause threatens to elevate the rights of the institutional media above the rights of all others protected by and performing functions within the Free Press and Free Speech Clauses. Such an approach is not firmly supported by history or precedent. It threatens to involve courts in improper value judgments concerning the scope of the privilege as well as who is entitled to claim it. The granting of special status to the institutional press would signal a ranking of First Amendment priorities contrary to the fundamental concept of freedoms proclaimed by that Amendment.

## ARGUMENT

### POINT I

**The Creation of an Absolute Privilege of Nondisclosure of Editorial Judgment and the Constitutional Immunization of the Editorial Process Has Fundamentally Changed the Principles of *New York Times v. Sullivan* and Its Progeny.**

**A. *The Accommodation of Competing Social Values From Sullivan to the Present and the Placing of the Calculated or Reckless Falsehood Outside the Ambit of Constitutional Protection.***

The decisions of this Court from *Sullivan* on represent a continuing effort to fashion principles that balance the competing social interests expressed in the First Amendment protections of freedom of speech and press and in the historic recognition of the right of legal redress for

persons damaged by false and defamatory publications.\* The issue was resolved in *Sullivan* by establishing for those sued for defamation by a public official a "defense for erroneous statements honestly made," *id.* at 278, a defense which requires the plaintiff to prove that the false and defamatory statement was made with "'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not . . ." *id.* at 279-280.

This rule of *Sullivan* reflected and continues to reflect this Court's effort to balance these competing societal interests. Mr. Justice Stewart, in *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 270 (1971), noted that the *Sullivan* rule "was based on a recognition that the First Amendment guarantee of a free press is inevitably in tension with state libel laws designed to secure society's interest in the protection of individual reputation." In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974), Mr. Justice Powell wrote of the Court's "continuing effort to define the proper accommodation between these competing concerns" of freedom of speech and press and the values served by the law of defamation. In *Time, Inc. v. Firestone*, 424 U.S. 448, 456

\* In *Sullivan*, Mr. Justice Brennan pointed to the great debate over the Sedition Act as crucial to a contemporary understanding of the central meaning of the First Amendment. 376 U.S. at 273-275. The focus of that debate was the Act's provisions for criminal prosecution of libel against government. Within that debate, the comparability of a free press with a civil action for damages to redress injury to reputation was recognized by even the staunchest critics of the Act. See, e.g.: Tunis Wortman, *A Treatise Concerning Political Enquiry*, 1800; George Hay, *An Essay on the Liberty of the Press*, 1799; St. George Tucker, *Tucker's Blackstone*, 1803; all reprinted in part in: L. Levy, *Freedom of the Press From Zenger to Jefferson* 230-284, 186-197, 318-326 (1966). In considering the salutary role of the civil libel action, concerns which continue to this day were noted: "There are two opposite extremes of Error to which the Press is liable to be perverted. The one, an interested partiality towards the Government; the other, a wanton or designing misrepresentation of its measures. In each of these cases the Press may be considered as Licentious . . ." \*\*\*Civil prosecutions, at the suit of injured individuals, are a sufficient restraint upon the licentiousness of the Press." Wortman, *op.cit.*, 274, 281.

(1976), Mr. Justice Rehnquist described the values in conflict as "the public's interest in an uninhibited press and its equally compelling need for judicial redress of libelous utterances."\*

The post-*Sullivan* cases expressly recognize the fundamental interests reflected in the law of defamation. Thus, in *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966) Mr. Justice Brennan noted society's "pervasive and strong interest in preventing and redressing attacks upon reputation." In *Gertz*, Mr. Justice Powell quoted Mr. Justice Stewart's statement in *Rosenblatt*, 383 U.S. at 92, that the individual's right to the protection of his own good name

reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system.\*\*

\* Lower Courts have also treated the *Sullivan* principles as an attempt to balance these basic interests. See e.g.: *Mahen v. Hughes Tool Co.*, 569 F.2d 459, 479-480 (9th Cir. 1977) ("It is important to safeguard First Amendment rights; it is also important to give protection to a person who is intentionally and maliciously defamed, and to discourage that kind of defamation in the future. A balance must be struck between those two competing interests.").

\*\* Also see: *Afro-American Publishing Co., Inc. v. Jaffe*, 366 F.2d 649, 660 (D.C. Cir. 1966) (*en banc*) ("The rule that permits satisfaction of the deep-seated need for vindication of honor is not a mere historic relic, but promotes the law's civilizing function of providing an acceptable substitute for violence in the settlement of disputes."); *Reliance Insurance Company v. Barron's*, 442 F.Supp. 1341, 1359 (S.D.N.Y. 1977).

Recognition of society's interest in reputation is, of course, not limited to Court decisions. See, e.g.: Proverbs 22:1: "A good name is rather to be chosen than great riches"; Shakespeare, *Othello*, Act 3, Scene 3:

Good name in man and woman, dear my lord,  
Is the immediate jewel of their souls;

If the interest in affording legal redress to persons whose reputation and name have been damaged by defamatory falsehood did not represent an important social value then there would have been less\* need to strike a balance which permits public officials and public figures to seek legal redress where the defamatory falsehood is published with actual malice. In *Gertz* Mr. Justice Powell wrote:

The need to avoid self-censorship by the news media is, however, not the only societal value at issue. If it were, this Court would have embraced long ago the view that publishers and broadcasters enjoy an unconditional and indefeasible immunity from liability for defamation. Such a rule would, indeed, obviate the fear that the prospect of civil liability for injurious falsehood might dissuade a timorous press from the effective exercise of First Amendment freedoms. Yet absolute protection for the communications media requires a total sacrifice of the competing value served by the law of defamation.

The legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood. We would not lightly require the State to abandon this purpose . . . .

(418 U.S. at 341; citations omitted)

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Who steals my purse steals trash; 'tis  
 something, nothing;  
 'Twas mine, 'tis his, and has been  
 slave to thousands;  
 But he that filches from me my good name  
 Robs me of that which not enriches him,  
 And makes me poor indeed.

\* There remains the role that damage actions for calculated and reckless falsehood do play in protecting the robust debate described in *Sullivan* for, as Mr. Justice Stewart warned in *Rosenblatt, supra*, "the poisonous atmosphere of the easy lie can infect and degrade a whole society." 383 U.S. at 94.

This statement is peculiarly apposite to the decision below where an absolute privilege of editorial judgment was created without any recognition of the societal interest in a person's reputation, good name or integrity.\*

The particular balance struck by this Court rests upon the recognition that the calculated or reckless falsehood has no place in the sanctuary of the First Amendment. As stated by Mr. Justice Brennan in *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964):

The use of calculated falsehood, however, would put a different cast on the constitutional question. Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published about a public official, should enjoy a like immunity. At the time the First Amendment was adopted, as today, there were those unscrupulous enough and skillful enough to use the deliberate or reckless falsehood as an effective political tool to unseat the public servant or even topple an administration. Cf. Riesman, *Democracy and Defamation: Fair Game and Fair Comment I*, 42 Col. L. Rev. 1085, 1088-1111 (1942). That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution. For the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected. Calculated falsehood falls into that class of utterances which "are no essential part of any ex-

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\* Indeed, Chief Judge Kaufman described the issue before the Court of Appeals as "the fundamental relationship between the First Amendment guarantee of a free press and the teaching of *New York Times v. Sullivan*" (P 3a). Apparently, the efforts represented by *Sullivan* and its progeny to strike a balance between competing social values were not recognized by the majority opinions below.

position of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . ." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572, 86 L. ed. 1031, 1035, 62 S Ct 766. Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.

*Also see: Pickering v. Board of Education*, 391 U.S. 563, 583 (1968) (White, J., concurring in part): "Deliberate or reckless falsehoods serve no First Amendment ends and deserve no protection under that Amendment."

In finding that false, but not dishonest, speech must be protected in order to assure "uninhibited, robust and wide-open" debate on public issues, *Sullivan* reasoned that a contrary rule would dampen the vigor and limit the variety of public debate by deterring those who believed the truth of their criticism but doubted whether it could be proved in court, 376 U.S. at 279. The "erroneous statement of fact", noted Mr. Justice Powell in *Gertz*, 418 U.S. at 340, is "inevitable in free debate." No similar conclusion is applicable to the calculated falsehood. Free debate does not require for its existence participants who know that their statements are false or who publish their defamatory misstatements with reckless disregard of whether they are false or not.\* Nor will anyone who believes in the truth of his statement be deterred from joining in debate on public issues out of fear that the statement may ultimately be false or its truth unprovable because it is only the in-

\* Mr. Justice White in *St. Amant v. Thompson*, 390 U.S. 727, 732, 731 (1968), reaffirmed "the line which our cases have drawn between false communications which are protected and those which are not" and described "deliberate falsification" and statements made where the defendant "entertained serious doubts as to the truth of his publication" as falling outside the protected area. Cf: Judge Meskill's statement below that "The publication of lies should be discouraged." (P 46a)

tentional lie and statements made with reckless disregard of their falsity which are not afforded First Amendment protection.\* In essence, the balance of competing social interests struck by *Sullivan* and its progeny rests upon the two-fold conclusion that the intentional lie and the recklessly false statement are not of constitutional value and that placing these statements outside the orbit of constitutional protection does not realistically inhibit or dampen the robust debate on public issues to which we have a "profound national commitment." *Sullivan*, 376 U.S. at 270.\*\*

#### **B. The Subjective State of Mind Test of Reckless Disregard and the Heavy Burden of Proof Imposed Upon the Plaintiff.**

In determining whether a publisher made a defamatory statement with reckless disregard of whether it was false, this Court has prescribed a subjective test directed at the state of mind of the publisher. In *Garrison, supra*, 379 U.S. at 74, Mr. Justice Brennan described the required state of mind as one where the defendant has made the false statements with a "high degree of awareness of their probable falsity"; in *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 153 (1967), Mr. Justice Harlan described it as "the publisher's awareness of probable falsity"; Mr. Justice White in *St. Amant, supra*, 390 U.S. at 731 wrote of the required state of mind as one where the publisher "entertained serious doubts as to the truth of his publication"; and, finally, the subjective nature of the test was noted in

\* See: *Appleyard v. Transamerican Press, Inc.*, 539 F.2d 1026, 1030 (4th Cir. 1976), cert. denied, 429 U.S. 1041 (1977).

\*\* "The right of free public expression does include the right to be in error. Liberty is experimental. Debate itself could not exist unless wrong opinions could be rightfully offered by those who suppose them to be right. But the assumption that the man in error is actually trying for truth is of the essence of his claim for freedom. What the moral right does not cover is the right to be deliberately or irresponsibly in error." The Commission on Freedom of the Press, *A Free and Responsible Press* 10 (1947).

Mr. Justice Powell's statement in *Gertz, supra*, 418 U.S. at 334 n. 6, that *St. Amant* "equated reckless disregard of the truth with subjective awareness of probable falsity. . . ."

When this Court determined that the balance of competing social interests should be struck so as to continue to exclude from First Amendment protections the knowing or reckless falsehood, it also imposed upon public official plaintiffs the burden of proving actual malice by clear and convincing evidence. *Sullivan*, 376 U.S. at 285-286. While there has been a shifting definition of the class of plaintiffs subject to the principles of *Sullivan*\* in the 14 years since that decision, there has been no indication by this Court that the heavy burden of proof of reckless disregard was also to be accompanied by a prohibition of direct proof of the subjective state of mind required to establish reckless disregard.

**C. The Impact of the Absolute Privilege Created by the Court Below Upon a Sullivan Plaintiff's Ability to Prove Actual Malice.**

A new and monumental burden has been placed upon plaintiffs seeking to prove the liability of a defendant for publishing with a state of mind outside First Amendment protections. The subjective nature of the state of mind requisite to establishing actual malice means defendant alone is normally the only source of direct evidence on that issue. To deprive plaintiffs of the opportunity to discover from defendant direct proof on the critical issue which plaintiffs must prove by clear and convincing evidence is to fatally tilt the balance in *Sullivan* libel cases in favor of defendants. In the District Court Judge Haight wrote

\* Compare: *Curtis Publishing Co. v. Butts, supra*; *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971); *Gertz v. Robert Welch, Inc., supra*; *Time, Inc. v. Firestone, supra*.

If the malicious publisher is permitted to increase the weight of the injured plaintiff's already heavy burden of proof by a narrow and restricted application of the discovery rules, so that the plaintiff is denied discovery into areas which in the nature of the case lie solely with the defendant, then the law in effect provides an arras behind which malicious publication may go undetected and unpunished. Nothing in the First Amendment requires such a result. (P 62a-63a)\*

The substantial impact of this prohibition on discovery is illustrated by consideration of a few of the state of mind matters which were disclosed during discovery in the instant case. Wallace's statement urging Lando to find for the Program someone to say Herbert was capable of committing atrocities himself (W 25; Ex. A-7; see p. 12, *supra*);\*\* Lando's note to check Stemmiess as to whether Herbert had witnessed the beating (L 917; Ex. 13, p. 7; see p. 10, *supra*); Lando's statement regarding the inconsistency between Nicholson and Crouch as to when Mrs. Franklin left Hawaii (L 353; see p. 16, *supra*);\*\*\* Wal-

\* After the decision below, Judge Brieant wrote in *Reliance Insurance Company v. Barron's, supra*, 442 F. Supp. at 1359: "In light of *Herbert*, and in view of the recent denial by the Supreme Court of *certiorari* in *Hotchner v. Castillo-Puche*, 551 F.2d 910 (2d Cir.), *cert. denied*, 46 U.S.L.W. 3202 (October 4, 1977), practical litigants may well conclude that any remedy for libel against a journalist by a public figure is now illusory."

\*\* In regard to proof of this statement by a tape recording taken by a third party, if the absolute privilege of editorial judgment conferred upon the press by the decision below follows other testimonial privileges, then the press could argue that third party disclosure could not be properly made without its consent. See e.g.: *Republic Gear Co. v. Borg-Warner Corp.*, 381 F.2d 551, 556 (2d Cir. 1967).

\*\*\* While Lando's notes of his Nicholson and Crouch interviews reflect the inconsistency of their stories on this matter, the issue of whether Lando believed that their statements were inconsistent could only be directly proved by his own statement.

lace's statement that he had the impression before the Program that Herbert had warned men in his command against the commission of atrocities (W 148-149; *see* p. 12, *supra*); Lando's statements to the Department of the Army that the purpose of the Program was to "debunk" Herbert and there would be no Program unless he can portray Herbert as the "bad guy" (Exs. I and II, *see* p. 15, *supra*)\*—are all types of statements which could be barred in the future from discovery. Thus, critical aspects of proof ascertained in discovering a defendant's activities in preparing a story for publication and bearing directly on that defendant's state of mind as to whether he entertained serious doubts as to the truth of matters contained in the publication would be legally concealed from the defamed plaintiff.

Judge Oakes noted that the decision below may deprive plaintiff of "adducing the best proof of malice in the common law sense of ill will toward the plaintiff" (P 41a, n.31).\*\* However, the absolute privilege created by the Court of Appeals encompasses the reporter's state of mind on the truth or falsity of matters published as well as his own views of the plaintiff. Indeed, in the case at bar the state of mind questions which were objected to by defen-

\* As to the admissibility of these statements contained in documents produced by a third party *see* footnote \*\*, p. 27, *supra*.

\*\* While common law malice differs from actual malice, such common law malice elements as motive and ill-will can constitute some evidence from which actual malice may be inferred. *See: Curtis Publishing Co. v. Butts, supra*, 388 U.S. at 156, n.20, 158 (evidence that Saturday Evening Post was anxious to publish an exposé); *Goldwater v. Ginzburg*, 414 F.2d 324, 342 (2d Cir. 1969), *cert. denied*, 396 U.S. 1049 (1970) ("There is no doubt that evidence . . . of motive and of intent may be adduced for the purpose of establishing, by cumulation and by appropriate inference, the fact of a defendant's recklessness or of his knowledge of falsity."); *Sprouse v. Clay Communications, Inc.*, — W.Va. —, 211 S.E. 2d 674, 681-683, 688 (Sup.Ct. of Appeals, W.Va. 1975), *cert. denied*, 423 U.S. 882 (1975). *See* Judge Haight's examination of the permissible relationship between evidence of negligence, motive and intent and the ultimate proof which the libel plaintiff must adduce to show actual malice (P 64a-67a).

dants (*see* pp. 11, 13-14, 15, *supra*; 185a-188a; 130a-131a), as well as those which were answered without objection (*see* pp. 16-17, *supra*), focus on defendants' awareness and doubts as to the truth or falsity of materials concerning matters presented on the Program. This is the state of mind of defendant which is at the core of the subjective test of reckless disregard. *See: Cantrell v. Forest City Publishing Co.*, 419 U.S. 245, 251-252 (1974).\*

While prohibiting plaintiff's proof of defendants' state of mind, the decision below apparently does not prevent defendants from testifying themselves as to their conclusions, the basis for those conclusions and their intentions when they believe such testimony would be helpful to their case. In fact, from *Sullivan* to the present, libel defendants have shown no reluctance to disclose their state of mind under such circumstances. *See e.g.: Sullivan*, 376 U.S. at 286 (testimony of New York Times' Secretary that he "thought" the advertisement was substantially correct); *Gertz*, 418 U.S. at 328 (magazine editor's affidavit stating reliance on author's reputation and prior experience with accuracy of other articles written by author); *Carson v. Allied News Co.*, 529 F.2d 206, 211-212 (7th Cir. 1976) (reporter's deposition testimony on "basis" for certain statements in the article); *McNair v. The Hearst Corporation*, 494 F.2d 1309, 1311, n.2 (9th Cir. 1974) (publisher's deposition testimony on the "impression" created by the article); *Vandenburg v. Newsweek, Inc.*, 441 F.2d 378, 380 (5th Cir. 1971), *cert. denied*, 404 U.S. 864 (1971) (deposition testimony as to reporter's belief in plaintiff); *Pauling*

\* At an earlier point in his concurrence, Judge Oakes had conceded that under *Sullivan* "the editor's state of mind, not vis-a-vis the plaintiff, but vis-a-vis the truth or falsity of what is being published about the plaintiff, is a proper focus of inquiry" (P 38a, n.26). The possible ramifications of this concession were avoided when Judge Oakes apparently viewed the state of mind questions as bearing on common law malice, rather than the actual malice of *Sullivan* and its progeny (P 41a, n.31). The District Court did not view the disputed questions in this manner (P 59a-61a; P 64-67a).

v. *Globe-Democrat Co.*, 362 F.2d 188, 198 (8th Cir. 1966) (deposition testimony by defendant's editor that they "felt" plaintiff was about to be cited); *MacNeil v. Columbia Broadcasting System, Inc.*, 66 F.R.D. 22, 25 (D.D.C. 1975); *F&J Enterprises, Inc v. Columbia Broadcasting Systems, Inc.*, 373 F.Supp. 292, 298 (N.D. Ohio 1974); *Ragano v. Time, Inc.*, 302 F.Supp. 1005, 1008-1010 (M.D. Fla. 1969), *aff'd*, 427 F.2d 219 (5th Cir. 1970).\*

Judge Oakes' comment that "free press principles . . . are being applied to limit a procedural rule, not to alter the substantive law of libel" (P 40a, n.28) misperceived the issue. Whether the privilege is described as procedural or substantive, the real issue is its impact on the substantive area of liability for defamation declared by *Sullivan* principles to be outside constitutional protection. Where the means of proving a particular matter required for liability have been effectively foreclosed, then the principle of liability itself has been nullified. As noted by Edmund Burke many years ago: "to refuse evidence is to refuse to hear the cause." 1794, Mr. Edmund Burke, Report to the House of Commons, Debrett's History of Hastings' Trial, 1796, pt. VII, Suppl. p. xxiii, 31 Parl. Hist. 324, quoted in I *Wigmore on Evidence* §10, p. 294

\* Significantly, not until the present case have *Sullivan* defendants claimed a need to protect the editorial process from disclosure. A concern that the exercise of First Amendment rights might be chilled was never heard when publishers were making such disclosures to show an absence of actual malice; only when such disclosure could have furnished critical aid to a plaintiff in establishing that the defamatory statements fell outside any constitutional protection did a First Amendment claim arise. See Judge Meskill, dissenting: "It seems to me that if such a privilege were really necessary to protect the editorial function, we would have heard about it long before now." (P 51a) Cf. *Branzburg, supra*, 408 U.S. at 698: "We are admonished that refusal to provide a First Amendment reporter's privilege will undermine the freedom of the press to collect and disseminate news. But this is not the lesson history teaches us. As noted previously, the common law recognized no such privilege, and the constitutional argument was not even asserted until 1958."

(3d Ed. 1940). More recently, we have been instructed that the creation of a privilege which prevents the obtaining of direct evidence on a basic issue in a judicial controversy cannot lightly be reduced to a mere procedural matter. In *United States v. Nixon*, 418 U.S. 683, 709-710 (1974), the Chief Justice wrote:

. . . The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.

. . .

. . . Whatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth.\*

The decision below also alters particular evidentiary principles which prevent a party from depriving the ad-

\* Both Chief Judge Kaufman (P 12a, n.16) and Judge Oakes (P 36 and n.23, n.24) suggest that procedural rules may be re-fashioned in light of First Amendment interests. However, other than the rules of independent appellate review and the heavier burden of proof enunciated in *Sullivan* itself, 376 U.S. at 285 and n.26 and 285-86, it would be inaccurate to conclude that courts have treated the *Sullivan* principles as calling for alteration of rules of procedure. See e.g.: *Guam Federation of Teachers v. Ysrael*, 492 F.2d 438, 442 (9th Cir. 1974), *cert. denied*, 419 U.S. 872 (1974) (the usual rules apply in determining whether a case should go to a jury); *Goldwater v. Ginzburg, supra*, 414 F.2d at 337-38, n.21 (usual principles governing summary judgment apply in libel cases); *Stearn v. McLean-Hunter Limited*, 46 F.R.D. 76, 80-81 (S.D.N.Y. 1969) (the usual pleading of malice called for by Rule 9(b), F.R.C.P., applies to *Sullivan* libel action); *Arizona Biochemical Co. v. Hearst Corporation*, 302 F.Supp. 412, 417 (S.D.N.Y. 1969) (same). In any event, the decision below creates a rule that is profoundly more than procedural both in its nature and ramifications.

versary of evidence or information necessary to defend or prove a claim put in issue by that party. In a libel action, the media defendant places the First Amendment *Sullivan* standard in issue by way of an affirmative defense to the claims asserted (*see, e.g.*: 93a, 107a, 122a). As noted by the District Court:

... defendants deny knowledge of any falsity that may be present, or that they proceeded with reckless disregard of truth or falsity. Thus defendants, as they are of course entitled to do, cast upon Herbert the onerous burden of proof that applies in cases of this nature. . . . (P 56a).

Central, of course, to that defense is the absence of that state of mind unprotected by *Sullivan* law. Yet, under the absolute privilege now formulated for editorial judgment matters, media defendants may deprive the libel plaintiff of information concerning the very state of mind which their defense asserts protects them from liability. The law has traditionally recognized that a party asserting a privilege impliedly waives it where, through some affirmative act, he has made the privileged matter relevant to the case. In *Hearn v. Rhay*, 68 F.R.D. 574, 581 (E.D. Wash. 1975), the Court rejected defendants' claim of attorney-client privilege where plaintiff sought discovery concerning their defense of good faith immunity. The Court reviewed the settled rules concerning waivers of the privilege:

[D]efendants assert the [attorney-client] privilege in aid of the affirmative defense that they are protected from liability by a qualified immunity. Therefore, all the elements common to a finding of waiver are present in this case: defendants invoked the privilege in furtherance of an affirmative defense they asserted for their own benefit; through this affirmative act they placed the protected information at issue, for the legal advice they received is germane to the qualified immunity defense they raised; and one result of assert-

ing the privilege has been to deprive plaintiff of information necessary to "defend" against defendants' affirmative defense, for the protected information is also germane to plaintiff's burden of proving malice or unreasonable disregard of his clearly established constitutional rights.

*Cf. Anderson v. Nixon*, 444 F.Supp. 1195 (D.D.C. 1978) (damage action by columnist required disclosure of his confidential sources during pre-trial discovery); *Haynes v. Smith*, 73 F.R.D. 572, 577 (W.D.N.Y. 1976) (affirmative defense of "reasonable belief" that defendant's actions did not infringe plaintiff's constitutional rights constituted implied waiver of attorney-client privilege);\* *cf. Lyons v. Johnson*, 415 F.2d 540 (9th Cir. 1969), *cert. denied*, 397 U.S. 1027 (1970) (Fifth Amendment). In short, the law does not favor a party's utilization of a privilege as both a sword and a shield regardless of whether it is the First Amendment which is claimed as the source of the privilege or some other right, rule or doctrine.

#### **D. The Impact of the Constitutional Immunization of the Editorial Process Upon the Liability of the Media.**

By immunizing the editorial process from judicial scrutiny, the decision below threatens to radically change a substantial body of constitutional law. A bar upon inquiry during the discovery stage would undoubtedly apply to the trial itself.\*\* Thus, an entire area of media activity

\* In *Jenoff v. Hearst Corp.*, No. H75-692 (D.Md. January 20, 1978) the Court found an express waiver of an editorial judgment privilege where media defendants had answered state of mind questions at depositions held prior to the decision of the Second Circuit herein, but sought the privilege as to questions raised in subsequent depositions held after the decision was announced. In any event, the Court concluded it would not have followed the Second Circuit's decision. Slip opinion, 5-7.

\*\* See P 45a, n.38; compare Rule 25(b)(1), F.R.C.P., which permits a more extensive attempt to ascertain the facts during discovery than would be permissible at trial. See also: P 63a.

has been removed from possible inquiry in a *Sullivan* case,\* regardless of whether the inquiry occurs before or at the trial.\*\* Moreover, if inquiry into the editorial process is not to be countenanced because of First Amendment concerns, then it follows that any judicial "intrusion" on that process, including a defamation action which centers upon what happened during the "transform[ation of] the raw data of reportage into a finished product" (P 9a), will be prohibited. In this day of documentaries, in-depth studies, and investigatory reports, the scope of media activity which has been thus removed from possible liability under *Sullivan* is substantial.\*\*\*

\* The contours of this protected area of activity are at least, in the word of Judge Oakes, "vague" (P 25a, n.5). Chief Judge Kaufman distinguished the area from the functions of acquiring and disseminating information (P 4a) and Judge Oakes quoted Chief Justice Burger's opinion in *Tornillo*, *supra* (P 45a). The media, meanwhile, has described the area as "begin[ning] when a news organization first decides to look into a subject and continu[ing] until the finished product appears in print or is broadcast." *The New York Times*, "Libel Case Against CBS Raises Questions About the Release of Data," November 15, 1977, p. 32 col. 3.

\*\* Despite concern expressed below with the breadth of discovery conducted in this case (P 19a) and the "untrammelled, roving discovery that has become so prevalent" (P 25a), the absolute privilege created by the decision is clearly not limited to pre-trial procedures.

\*\*\* The present case does not involve "the accurate disinterested reporting" of charges against a *Sullivan* plaintiff which was held to be involved in *Edwards v. National Audubon Society*, 556 F.2d 113 (2d Cir. 1977), *cert. denied*, 46 U.S.L.W. 3390 (Dec. 13, 1977). Here, defendants were reporting on the results of their own investigation (42a); espousing their own conclusions and concurring in the charges made by Gen. Barnes and Col. Franklin (*see e.g.*: 48a, 51a, 53a, 56a), and distorting in the Program the matters which they had investigated. As stated by Chief Judge Kaufman in *Edwards*: "a publisher who in fact espouses or concurs in the charges made by others, or who deliberately distorts these statements to launch a personal attack of his own on a public figure, cannot rely on a privilege of neutral reportage. In such instances he assumes responsibility for the underlying accusations. *See Goldwater v. Ginzburg* [citation omitted]." *Id.* at 120.

Further, the reach of an absolute privilege for editorial judgment extends far beyond a post-publication defamation suit. If the conclusion is sound that First Amendment concerns require absolute protection of the editorial process from disclosure then the decision below has similarly removed this substantial part of the media's activity from judicial scrutiny under statutes and laws long recognized as generally applicable to the media. *See e.g.*: *Associated Press v. NLRB*, 301 U.S. 103 (1937) (National Labor Relations Act); *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946) (Fair Labor Standards Act); *Associated Press v. United States*, 326 U.S. 1 (1945) (Sherman Anti-Trust Act); *Westermann Co. v. Dispatch Printing Co.*, 249 U.S. 100 (1919) (copyright law); *cf. Miller v. California*, 413 U.S. 15 (1973) (obscenity laws); *cf. Tuck v. McGraw-Hill, Inc.*, 421 F.Supp. 39 (S.D.N.Y. 1976) (Title VII of the Civil Rights Act).

The decision below has thus pronounced a sweeping rule which adversely impacts upon carefully drawn substantive constitutional and legal rights essential to our democratic system. As Mr. Justice Frankfurter cautioned, concurring in *Pennekamp v. Florida*, 328 U.S. 331, 350-351 (1946):

[D]emocracy is the least static form of society. Its basis is reason not authority. Formulas embodying vague and uncritical generalizations offer tempting opportunities to evade the need for continuous thought. But so long as men want freedom they resist this temptation. Such formulas are most beguiling and most mischievous when contending claims are those not of right and wrong but of two rights, each highly important to the well-being of society. Seldom is there available a pat formula that adequately analyzes such a problem, least of all solves it.

## POINT II

### Decisions of This Court Concerning Government Attempts to Direct What Shall or Shall Not Be Printed Are Not Determinative of the Level of First Amendment Protections Required in Regard to Disclosure of the Editorial Process in a Post-Publication *Sullivan* Libel Case.

The foundation of Chief Judge Kaufman's analysis leading to the creation of an absolute privilege is his view that the particular media function in issue, rather than the nature of the governmental or state action, determines the extent of protection required in order to secure the interests of the First Amendment. Starting from that view it is a relatively facile journey through *Tornillo* and *Democratic National Committee, supra*, to the conclusion that the function of editorial process is entitled to absolute protection. Upon examination, however, that analysis collapses.

An analysis which treats the particular press function as determinative of the level of First Amendment protection is contrary to the decisions of this Court. Indeed, those decisions repeatedly point out that the level of constitutional protection will normally depend upon the nature of governmental regulation sought. This approach received an early full exposition in *Near v. Minnesota, supra*, 283 U.S. at 713-715. There, Chief Justice Hughes wrote:

In determining the extent of the constitutional protection, it has been generally, if not universally, considered that it is the chief purpose of the guaranty to prevent previous restraints upon publication. The struggle in England, directed against the legislative power of the licenser, resulted in renunciation of the censorship of the press. The liberty deemed to be established was thus described by Blackstone: "The liberty of the press is indeed essential to the nature of

a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity." 4 Bl. Com. 151, 152; see Story on the Constitution, §§ 1884, 1889.

• • •

... In the present case, we have no occasion to inquire as to the permissible scope of subsequent punishment. For whatever wrong the appellant has committed or may commit, by his publications, the state appropriately affords both public and private redress by its libel laws. (footnote omitted)

In *Tornillo*, Chief Justice Burger for the majority, wrote that what was at issue in that case was governmental compulsion upon a publisher "to print that which it would not otherwise print." *Id.* 418 U.S. at 256. Such compulsion, the Chief Justice noted, "operates as a command in the same sense as a statute or regulation forbidding appellant to publish specified matter." *Id.* The significance of distinctions based upon the particular nature of the government action was noted in an earlier passage of the Chief Justice's opinion:

The Court foresaw the problems relating to government-enforced access as early as its decision in *Associated Press v. United States, supra*. There it carefully contrasted the private "compulsion to print" called for by the Association's bylaws with the provisions of the District Court decree against appellants which "does not compel AP or its members to permit publication of anything which their 'reason' tells them should not be published." 326 U.S. at 20 n 18. 89 L Ed

2013. In *Branzburg v. Hayes*, 408 U.S. 665, 681, 33 L Ed 2d 626, 92 S Ct 2646 (1972), we emphasized that the cases then before us "involve no intrusions upon speech or assembly, no prior restraint or restriction on what the press may publish, and no express or implied command that the press publish what it prefers to withhold."

*Id.* at 254-255.

The concurring opinions in *Tornillo* further underline the fact that that decision turned upon the attempt of government to compel the media to publish what it otherwise would not, rather than any conclusion that the editorial process was immune from all state action including post-publication scrutiny in a *Sullivan* libel suit. Mr. Justice Brennan, with Mr. Justice Rehnquist, concurring, specifically stated that the decision "addresses only 'right of reply' statutes and implies no view upon the constitutionality of 'retraction' statutes affording plaintiffs able to prove defamatory falsehoods a statutory action to require publication of a retraction." *Id.* at 258. Mr. Justice White, concurring, noted also the jurisprudential rule that "government tampering, *in advance of publication*," with "news and editorial content" is forbidden by a "virtually insurmountable" First Amendment barrier. *Id.* at 259 (emphasis added). For Mr. Justice White the "constitutionally obnoxious feature" of the law was that it "runs afoul of the elementary First Amendment proposition that government may not force a newspaper to print copy which, in its journalistic discretion, it chooses to leave on the newsroom floor." *Id.* at 261. However, there remains an area of post-publication accountability by the press: "But though a newspaper may publish without government censorship, it has never been entirely free from liability for what it chooses to print. . . . Among other things, the press has not been wholly at liberty to publish falsehoods damaging to individual reputation." *Id.* And further, "the press certainly remains liable for knowing or reckless falsehoods

under *New York Times Co. v. Sullivan* . . . and its progeny, however improper an injunction against publication might be." *Id.* at 262.

*Democratic National Committee* addressed the issue of whether the federal government could compel the broadcast media to accept paid editorial advertising. The effect of such restraints on the editorial judgment of broadcasters was the focus of the Chief Justice's opinion: "it would be anomalous for us to hold, in the name of promoting the constitutional guarantees of free expression, that the day-to-day editorial decisions of broadcast licensees are subject to the kind of restraints urged by respondents." 412 U.S. at 120. Later in the opinion, the Chief Justice wrote: "the question here is . . . who shall determine what issues are to be discussed by whom, and when." *Id.* at 130.\*

In *Nebraska Press Assn. v. Stuart*, 427 U.S. 539 (1976)\*\* this Court once again noted the pivotal position of the nature of the state's attempt to interfere with speech or press activity. Chief Justice Burger, writing for the Court, analyzed the long history of First Amendment protections against governmental prior restraints and noted the very different questions posed by state action in the form of post-publication inquiries in a defamation case:

The thread running through all these cases is that prior restraints on speech and publication are the

\* *Democratic National Committee* also reflected concern that the access there sought would result in a virtual monopoly of editorial advertising time by the financially affluent or by those of one political persuasion. *Id.* at 123.

\*\* After *Tornillo* and prior to *Nebraska Press Assn.* the Court rendered its decision in *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975), in which Mr. Justice Blackmun, for a majority of the Court, succinctly noted the distinction between subsequent liability for published matter and the formidable dangers inherent in "freewheeling censorship" prior to publication: "a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand."

most serious and the least tolerable infringement on First Amendment rights. A criminal penalty or a judgment in a defamation case is subject to the whole panoply of protections afforded by deferring the impact of the judgment until all avenues of appellate review have been exhausted. Only after judgment has become final, correct or otherwise, does the law's sanction become fully operative.

*Id.* at 559.

Mr. Justice Brennan, concurring, with Mr. Justice Stewart and Mr. Justice Marshall joining, further commented upon the critical relationship between the nature of the state action and the level of protection to be afforded. After stating that "there can be no prohibition on the publication by the press of any information pertaining to pending judicial proceedings or the operation of the criminal justice system, no matter how shabby the means by which the information is obtained," *Id.* at 588, Mr. Justice Brennan specifically noted the existence of other avenues whereby "shabby" reportage may be challenged:

Of course, even if the press cannot be enjoined from reporting certain information, *that does not necessarily immunize it from civil liability for libel or invasion of privacy or from criminal liability for transgressions of general criminal laws during the course of obtaining that information.* (*Id.* n. 15; emphasis added)\*

\* In a footnote responding to the characterization by the Nebraska Supreme Court of petitioners' position as "extremist and absolutist," Mr. Justice Brennan wrote:

... [P]etitioners do not assert that First Amendment freedoms are paramount in all circumstances. For example, this case does not involve the question of when, if ever, the press may be held in contempt subsequent to publication of certain material. . . . Nor does it involve the question of damage actions for malicious publication of erroneous material concerning those involved in the criminal justice system, . . .

As a result of its analytical approach based upon particular media functions, the decision below has rewritten the law of constitutional libel. *Sullivan* and subsequent cases had defined the level of First Amendment protection required when the state action consisted of a post-publication civil case for libel against a public official or public figure. The decision below has now decided that a different and absolute level of protection normally applicable where the state attempts to dictate what should or should not be printed must be imposed in a *Sullivan* libel case upon the effort to discover facts directly relevant to the concededly critical issue of the publisher's state of mind. While *Sullivan* and its progeny have found defamation actions premised upon the actual malice standard to be constitutionally permissible, the Court below has concluded that discovery of direct proof of actual malice is not constitutionally permissible. By relying upon decisions of this Court involving pre-publication governmental action, the Court below has effectively accomplished what a majority of this Court has declined to do for the fourteen years since *Sullivan*—grant an immunity to the media for publications made with a reckless disregard of their truth.\*

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And no contention is made that the press would be immune from criminal liability for crimes committed in acquiring material for publication.

(*Id.* at 594, n.20; citations omitted)

\* Judge Oakes' treatment of plaintiff's attempt to discover defendants' state of mind in this post-publication libel suit as a prior restraint (P 35a-36a) is not supportable. Every post-publication state action concerning a media activity may be said to present some possibility of being a prior restraint on future activities of the same nature. Thus, Judge Oakes' view would lead to a finding of an impermissible prior restraint whether the state action consists of requiring answers to questions seeking disclosure of the views and doubts of a *Sullivan* libel defendant regarding the truth or falsity of the published materials, or requiring disclosure of confidential sources at a grand jury (*cf. Branzburg*), or, ultimately, permitting a Court action for defamation (*cf. Sullivan*), or invasion of privacy (*cf. Time, Inc. v. Hill*, 385 U.S. 375 (1967)), or

### POINT III

#### **Confidential Source Disclosure Cases Do Not Require Creation of a Privilege of Nondisclosure of the Editorial Process in Order to Give Proper Consideration to the First Amendment in a *Sullivan* Libel Case.**

Chief Judge Kaufman's creation of an absolute constitutional privilege for editorial judgment is said to be based upon this Court's recognition in *Branzburg v. Hayes*, *supra*, that the First Amendment affords some protection to newsgathering (P 7a-8a). While some constitutional deference to this function of the press was recognized in *Branzburg*, this Court did not grant the media a privilege immunizing confidential news sources from disclosure, nor did it suggest that an absolute privilege for any media function or activity would be appropriate.\* The Court's opinion could not be clearer:

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appropriation of property (*Zacchini v. Scripps-Howard Broadcasting Co.*, — U.S. —, 53 L.Ed.2d 965 (1977). Cf. *Landmark Communications, Inc. v. Virginia*, — U.S. —, 46 U.S.L.W. 4389, 4391 (U.S. May 1, 1978) where Chief Justice Burger noted that a statute providing for post-publication criminal punishment of third persons, including the media, for divulging or publishing information regarding proceedings before a state judicial review commission did not constitute a prior restraint.

\* The reporters in *Branzburg* did not even request an absolute privilege against official interrogation concerning confidential sources under all circumstances, but only "until and unless sufficient grounds are shown for believing that the reporter possesses information relevant to a crime the grand jury is investigating, that the information the reporter has is unavailable from other sources, and that the need for the information is sufficiently compelling to override the claimed invasion of First Amendment interests occasioned by the disclosure." 408 U.S. at 680; *see also: id.* at 702-704. The Court rejected this balancing approach because of the difficulty in predicting when such a privilege was legitimately raised and when not, as well as to whom the cloak of privilege might extend. *Id.* at 702-706. Ironically, Judge Oakes expressed the same concerns over the balancing approach suggested

Until now the only testimonial privilege for unofficial witnesses that is rooted in the Federal Constitution is the Fifth Amendment privilege against compelled self-incrimination.

We are asked to create another by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy. This we decline to do.

(408 U.S. at 689-690)

Both the *Branzburg* plurality and Mr. Justice Powell, concurring, recognized that First Amendment values are implicated by limitations upon gathering news or safeguarding confidential sources; however those opinions are turned inside out to utilize the refusal to create a privilege for news sources in *Branzburg* as precedent for creating an absolute privilege for the media defendant's disclosure of state of mind matters in a libel action.

Moreover, Chief Judge Kaufman's opinion ignored the factors particular to libel actions where discovery is sought concerning the reporter's subjective state of mind which distinguish that situation from the usual circumstances where identity of a confidential source is sought. In the libel case, the reporter is a party being asked to account for his or her own activities in publishing statements alleged to be outside *Sullivan* principles; in other cases, the

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by defendants below for editorial judgment matters, but concluded instead that an absolute privilege was the only appropriate response (P 43a-44a). Several courts which have considered source disclosure claims have observed that no constitutional privilege as described by the Chief Judge below (P 8a) was articulated in *Branzburg*. *See, e.g.: United States v. Liddy*, 354 F. Supp. 208, 213-214 (D.D.C. 1972); *Caldero v. Tribune Publishing Co.*, 98 Idaho 288, 562 P.2d 791, 797 (1977) *cert. denied*, 46 U.S.L.W. 3288 (U.S. Oct. 31, 1977); *Ammerman v. Hubbard Broadcasting*, 3 Med. L. Rep. 1616, 1622 (N. Mex. Ct. of Appeals 1977), *cert. denied*, — U.S. —, 46 U.S.L.W. 3709 (U.S. May 15, 1978).

reporter's own activity is not the subject of the claim of wrongdoing and the information sought which involves the newsgathering activity serves the purposes of persons engaged in litigation to which the reporter is not a party. Thus, Chief Judge Kaufman, relying upon *Baker v. F & F Investment*, 470 F. 2d 778 (2d Cir. 1972), *cert. denied* 411 U.S. 966 (1973), a non-libel action involving a request for a non-party journalist's sources on a matter tangential to the case, asserted that *Baker* "elaborated on the privilege established by *Branzburg*" to find protection of confidential source disclosure "compelled" by the First Amendment (P 8a-9a and n.12). While *Baker* held that First Amendment interests required a balancing approach on matters of compelled source disclosure, it specifically recognized and approved the distinction which existed between the factual situation before it and a libel case. *Id.* at 783-784. The key to this distinction is found in *Garland v. Torre*, 259 F. 2d 545, 550 (2d Cir. 1958), *cert. denied*, 358 U.S. 910 (1958),\* which held that a journalist must reveal sources where the questions asked go "to the heart of the plaintiff's claim". While acknowledging that freedom of the press was "vital" to a free society, then Judge Potter Stewart found that this freedom was "not an absolute."

... [B]asic too are courts of justice, armed with the power to discover the truth. The concept that it is the duty of a witness to testify in a court of law has

\* Although Chief Judge Kaufman mentioned *Garland* in a footnote (P 9a, n.12), the critical distinction between that case and source disclosure issues in the non-libel area exemplified by *Baker* was not discussed. The *Branzburg* plurality opinion makes specific approving reference to the *Garland* holding denying a claim that the First Amendment exempted confidential information from public disclosure in a civil suit, 408 U.S. at 685-686. The emphasis in Mr. Justice Powell's concurrence upon the relationship of the challenged inquiry to the subject of the investigation also reflects approval of the *Garland* holding. *Id.* at 710.

roots fully as deep in our history as does the guarantee of a free press.

(*Id.* at 548)\*

Numerous decisions have recognized the difference between cases where accountability for the journalist's publications is at issue in a litigation and cases where the fruits of the efforts of those engaged in the newsgathering process are sought to be used for litigation involving others. See e.g., *Carey v. Hume*, 492 F.2d 631, 635-636 (D.C. Cir. 1974); *pet. for cert. dismiss.*, 417 U.S. 938 (1974);\*\* *Apicella v. McNeil Laboratories, Inc.*, 66 F.R.D. 78, 81-82 (E.D.N.Y. 1975); *Democratic National Committee v. McCord*, 356 F. Supp. 1394, 1397 (D.D.C. 1973); *Caldero v. Tribune Publishing Co.*, *supra*; *Dow Jones & Co., Inc. v. Superior Court*, 364 Mass. 317, 303 N.E. 2d 847 (1973); *State v. Buchanan*, 250 Or. 244, 436 P. 2d 729 (1968) *cert. denied*, 392 U.S. 905 (1968); *Winegard v. Oxberger*, 3 Med. L. Rep. 1326, 1329-1330 (Iowa Sup. Ct. 1977), *cert. denied*, 46 U.S.L.W. 3709 (U.S. May 15, 1978); *Ammerman v.*

\* Justice Stewart, although dissenting in *Branzburg*, nonetheless reaffirmed the *Garland* holding and the occasions where compelled disclosure of media sources is required, 408 U.S. at 743, and n. 33.

\*\* The concurring opinion in *Carey v. Hume*, *supra*, 492 F. 2d at 640-641, described the countervailing values involved in the balancing process central to the *Garland* rule: "The news media must be free but it should also be responsible. To hold that it is responsible to the same extent as all other citizens are responsible for libelous publications, with the additional freedom recognized in *New York Times*, does not amount to an infringement on the constitutional guarantee of free speech and the freedom of the press. [Citation omitted] . . . the constitutional grant of 'freedom . . . of the press' does not convey an absolute immunity to publish libelous information that it receives and then protect itself and the source by exercising a privilege that prevents the victim from proving the malicious intent of the source or publisher." (emphasis added)

*Hubbard Broadcasting, supra*, 3 Med. L. Rep. at 1622-1623; *Cf. Anderson v. Nixon, supra*, 444 F. Supp. at 1199.\*

As noted by Judge Meskill, dissenting below, courts are to consider First Amendment values implicated by discovery matters. However, such consideration is neither tantamount to a source disclosure privilege nor a precedent for denying critical state of mind evidence in a libel action:

Contrary to the suggestions of my colleagues, there is presently no constitutional privilege against disclosure of a journalist's confidential sources, either in the criminal context [citing *Branzburg*] or in the civil context [citing *Garland*, . . . *Baker v. F&F Investment* . . . which is cited by the majority as supporting such a privilege, merely held that a district judge in a civil case did not abuse his discretion in denying a motion to compel a non-party journalist to disclose the identity of a confidential news source where the identity of the source was of questionable materiality to the plaintiff's cause of action and could be obtained by other means. . . . The decision stands for the proposition, with which I wholeheartedly agree, that the public interest reflected in the First Amendment and in State "newsman's privilege" statutes is entitled to be con-

\* *Cervantes v. Time, Inc.*, 464 F. 2d 986 (8th Cir. 1972), cert. denied, 409 U.S. 1125 (1973) did not create a privilege from confidential source disclosure (see P 9a, n.12). Indeed, *Cervantes* specifically states: "Where there is a concrete demonstration that the identity of defense news sources will lead to persuasive evidence on the issue of malice, a District Court should not reach the merits of a defense motion for summary judgment until and unless the plaintiff is first given a meaningful opportunity to cross-examine these sources. . . ." 464 F. 2d at 994. Summary judgment was granted and affirmed notwithstanding one open request for source disclosure, where, despite extensive pre-trial discovery, Mayor Cervantes had been unable to "present little more than a series of self-serving affidavits . . . which framed but a minimal assault on the truth of the matters contained in the four paragraphs." *Id.* *Cervantes* is thus no more than an example of *Garland* in practice.

sidered when a district judge exercises discretion with regard to discovery matters. The decision recognized no privilege. In view of *Branzburg* and *Garland* it could not have. . . . Thus, to the extent that the majority relies on "the privilege established by *Branzburg*" and its elaboration in *Baker*, today's decision is without precedential foundation.\*

(P 48a-49a; citations and quotation omitted)

In cases where compelled source disclosure has been in issue, the claimed impact upon the media's recognized newsgathering function has been documented. In *Branzburg*, for example, affidavits were submitted by members of the press community attesting to the dangers attendant to forced revelation of confidential sources, 408 U.S. at 693, n.31; 699 and n.38; see also, *id.* at 730-732 and n.8; 736, n.20 (Stewart, J., dissenting). Yet the Court was unwilling to protect such disclosure by constitutional privilege. However, as noted by Judge Meskill, the decision below has created a new and absolute protection "based on claims of chilling effect that depend on the imaginations of judges rather than proof supplied by the parties" (P 52a).\*\* As a

\* The consideration of First Amendment concerns involved in weighing issues of confidential source disclosure has led other courts to require disclosure of editorial matters. See, e.g.: *Gilbert v. Allied Chemical Corp.*, 411 F. Supp. 505, 511 (E.D. Va. 1976) ("There is in the Court's view, no basis in the First Amendment for a privilege relating to a reporter's or editorialist's slant on a news story or editorial. Only if material requested directly leads to the disclosure of confidences does the privilege attach."); *Winegard v. Oxberger, supra*, 3 Med. L. Rep. at 1327 (disclosure required not only of sources but also "preparation of the articles, and procedures followed in editing them").

\*\* A 1971 survey of journalists, for example, indicated that more than 90% of those interviewed were more concerned with protecting confidential sources than with protecting the content of confidential information acquired in the newsgathering process. Blasi, *The Newsman's Privilege: An Empirical Study*, 70 Mich. L. Rev.

practical matter, there may be some basis to the view that disclosure of confidential sources may have an effect upon the newsgathering process because it could result in a drying up of news sources in the future by reason of the very disclosure and without regard to whether the inquiry involves protected activities of the journalist. In contrast, disclosure of the reporter's editorial judgment does not itself dry up or impair any news sources for the future. Such disclosure, moreover, occurs in the context of discovery directed at ascertaining whether the journalist has acted outside the orbit of constitutional protection. In short, such disclosure is directed at having the journalist account for his calculated and reckless falsehoods; and it is only the publication of such falsehoods which may be deterred in the future.\*

The misapplication of this Court's views in the area of compelled source disclosure is perhaps best illustrated by a comparison between the concerns which led Chief Judge Kaufman to enunciate an absolute immunity and this Court's unanimous recognition in *United States v. Nixon*, *supra*, 418 U.S. at 709-710, that a claim of privilege to withhold information from courts of law is not to be lightly bestowed, even in a case where the privilege claimed belonged to the President of the United States. Chief Judge Kaufman found that "a reporter or editor, aware that his thoughts might have to be justified in a court of law, would often be discouraged and dissuaded from the creative verbal testing, probing, and discussion of hypoth-

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229, 277-278 (1971). *Cf. United States v. Liddy*, *supra*, 354 F.Supp. at 215-216 and n.31. *See also*, Note, Reporters and Their Sources: The Constitutional Right to a Confidential Relationship, 80 Yale L.J. 317, 329-332 (1970).

\* Not only does such disclosure involve the publication of statements undeserving of any constitutional protection, *see pp. 23-25, supra*, but it is also consistent with the objective of a press that conducts itself responsibly. *Cf. Nebraska Press Association*, *supra*, 427 U.S. at 560; *Pennkamp v. Florida*, *supra*, 328 U.S. at 365 (J. Frankfurter, concurring).

eses and alternatives which are the *sine qua non* of responsible journalism." (P 13a). Chief Justice Burger, however, rejected a similar contention concerning the possible chill upon the executive decision-making process: "The interest in preserving confidentiality is weighty indeed and entitled to great respect. However, we cannot conclude that advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution." 418 U.S. at 712.

Requiring a journalist to give relevant evidence in a libel action does not affect legitimate news activities or press functions. Disclosure of evidence relevant to establishing actual malice would have no impact upon future publication of any matters other than false and defamatory statements dishonestly made.

The underlying rationale of the First Amendment protection of freedom of the press is clear. In a society so organized as ours, the public must know the truth in order to make value judgments, not the least of which regard its government and officialdom. . . . We cannot accept the premise that the public's right to know the truth is somehow enhanced by prohibiting the disclosure of truth in the courts of the public.

(*Caldero v. Tribune Publishing*, *supra*, 562 P. 2d at 801)

In the present situation, the fact that the information sought from defendants went to the "heart" of plaintiff's claim was recognized by the District Court (P 60a; P 64a-66a; P 91a) as well as by Judges Oakes and Meskill below (P 40a-43a; P 46a-47a). That the lawsuit is not "frivolous" is amply demonstrated by the claims set forth in the complaint (8a-88a) and the facts developed to date (*see pp. 9-17, supra*; *cf. P 18a, P 22a, P 40a*). It is also amply clear that evidence of defendants' state of mind is not, by

its very nature, directly obtainable by other means. The difficulties of requiring a libel plaintiff to look elsewhere for information uniquely under defendant's control were discussed by District Judge Haight (P 63a).<sup>\*</sup> In short, due consideration was given by the District Court to the factors discussed in *Garland* and other source disclosure decisions where First Amendment claims were asserted in an attempt to bar disclosure.

Thus, while the majority below mischaracterized and misapplied the source disclosure cases to create a new privilege for the editorial process, the District Court's discovery rulings were made with full regard for the legal analysis and First Amendment cautionary principles articulated in those decisions. The concerns of the First Amendment have been and can be properly addressed within the framework of the *Sullivan* principles without the creation of a new privilege.

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<sup>\*</sup> The difficult task of ascertaining alternative state of mind proof cannot be overstated. Chief Judge Oakes suggested that Freedom of Information Act materials obtained by Herbert might make defendant's state of mind "provable without directly impinging on the editorial process" (P 40a). However, it is far from clear whether these documents would even be admissible under the rationale of the decision below (*see* p. 27, n<sup>\*\*</sup> *supra*). In addition, such information would normally be difficult to come by except in the limited class of cases where a plaintiff will have access to this unique statute. Finally, Chief Judge Kaufman discussed the nature of the evidence which could be submitted to the jury for "inference" as to actual malice (P 22a), much of this information was disclosed to plaintiff during discovery of facts pertaining to the editorial process. Thus, the ultimate admissibility into evidence of such matters is left in doubt (P 45a, n.38).

## POINT IV

### **Preferred Treatment of the Institutional Press Under the First Amendment Is Not Soundly Supported by Either History or Precedent and Would Create Conflicts in Principle and Confusion in Practice by Creating Group Priorities for First Amendment Protections.**

Judge Oakes found the absolute editorial process immunity to be based upon an "evolving recognition of the special status of the press in our governmental system and the concomitant special recognition of the Free Press Clause of the First Amendment" (27a). Relying upon a theory advanced by Mr. Justice Stewart which suggests that a structural, institutional distinction should characterize society's view of a free press, Stewart, *Or of the Press*, 26 Hastings L.J. 631, 633 (1975), Judge Oakes expanded this distinction to create superior rights for the press. This interpretation places equally important First Amendment values in contradiction, and creates a preferred status for some individuals or groups within our society which diminishes the rights and privileges of others. This treatment of the Free Press Clause does not have the support of either history or judicial precedent.

#### ***The Historical Considerations***

Commentators on the history and intentions of the Speech and Press Clauses have pointed out that no separate, preferred position for the press was intended to be made within the First Amendment's proscription against abridgement of speech *and* press. *See, e.g.*, L. Levy, *Legacy of Suppression: Freedom of Speech and Press in Early American History 173-174* (1960); Lange, *The Speech and Press Clauses*, 23 U.C.L.A. L.Rev. 77 (1975); L. Levy, *Freedom of the Press*, *supra* at lv-lvi, 41-42. Chief Justice

Burger recently observed in his concurring opinion in *First National Bank of Boston v. Bellotti*, — U.S. —, 46 U.S.L.W. 4371, 4380 (U.S. April 26, 1978) that, despite disagreements over the exact intentions of the framers when drafting the language of the First Amendment, the Speech and Press Clauses were of equal value, with the special mention of the Press Clause resulting from the particular American historical experience where the Press "had been more often the object of official restraints." *See also: Lange, supra*, at 100-101; *cf. Nimmer, Is Freedom of the Press A Redundancy: What Does It Add To Freedom of Speech?*, 26 Hastings L.J. 639, 640-641 (1975); F. Holt, *Of the Liberty of the Press*, reprinted in *Freedom of the Press From Hamilton to the Warren Court* 17-20 (H.L. Nelson ed. 1967).\*

\* Throughout the Colonial period in America and during the period just prior to ratification of the First Amendment, the press was the object of official prior restraints to which the spoken word was not susceptible. Levy, *Legacy of Suppression, supra* at 173-174. Although the licensing system had expired in Britain in 1694, licensing of the right to report official proceedings of the Colonial Assembly persisted in Massachusetts until 1721, in Pennsylvania until 1722 and was in effect in New York as late as 1753. *Id.* at 44, 46. A stamp tax on newspapers was put into effect in Massachusetts in 1785, to be followed by an advertisement tax in 1786. *See Grosjean v. American Press Co.*, 297 U.S. 233, 248 (1936). Governmental prior restraint was met with efforts to secure for the press freedom from such controls. *See, e.g., F. Holt, Of the Liberty of the Press, supra; Jefferson, Draft of A Constitution For Virginia*, reprinted in *Basic Writings of Thomas Jefferson* 182, 190 (Foner ed. 1944); Levy, *Legacy of Suppression, supra* at 203. Thus, the Framers had had ample experience with governmental attacks in the form of economic restraints upon the printing trade. They gave specific constitutional protection from the application of federal power to the press because they wanted to ensure that the printed word was insulated from the types of governmental intrusions to which it, as distinct from the spoken word, was vulnerable. Elevation of the trade itself to a favored place in the American body politic was not the intent of the Free Press guarantee.

The equal weight appropriate for the Speech and Press Clauses is compelled by the historical nexus between the two rights. As one commentator on the heritage of freedom of expression has observed:

Among the important lessons in this heritage, it would seem, were these: There were, of course, differences between free speech and a free press. The former was by far the older and, of the two, more basic. Yet it was the latter which had amplified the former and given it meaning for the common man. It was entirely appropriate that the two concepts be used interchangeably for, in as nearly literal a sense as propositions of this sort can ever acquire, the two were functionally inseparable. Free speech could not exist in the fullest sense without freedom of the press; a free press, on the other hand, had no occasion to exist without freedom of speech. Thus viewed, the two could scarcely be set apart for neither had ever quite existed without the other.

(*Lange, supra* at 96)

### **Precedential Considerations**

In many decisions this Court has emphasized that there is no constitutionally approved process of ranking beneficiaries of First Amendment rights. While the press guarantee protects the dissemination of views and information to the public, it has not been thought that members of an "institution" known as the press or the media are somehow in a more preferred position than others protected by the First Amendment's language. Reordering Constitutional rights to prefer one over another where they were granted in equal terms is inappropriate.\*

\* As noted by Chief Justice Burger in *Nebraska Press Assn., supra*, 427 U.S. at 561:

The authors of the Bill of Rights did not undertake to assign priorities as between First Amendment and Sixth Amend-

This Court has never found that constitutional protection afforded by the *Sullivan* principles varies in scope or depth between speech and press. In *Sullivan* itself, both rights were before the Court. A separate petition for certiorari filed by the four individual defendants was granted from the same judgment appealed by the Times "because of the importance of the constitutional issues involved". 376 U.S. at 264. Mr. Justice Brennan's opinion begins by describing those issues:

We are required in this case to determine for the first time the extent to which the constitutional protections for *speech and press* limit a State's power to award damages in a libel action brought by a public official against *critics* of his official conduct.\*

(Id. at 256; emphasis added).

The Court expressed its belief in the equal value placed by the First Amendment upon both individual speakers and the media community in its rejection of the claim that the challenged advertisement was mere "commercial" speech:

Any other conclusion would discourage newspapers from carrying "editorial advertisements" of this type, and so might shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities—who wish to exercise their freedom of speech even though they are not members of the press . . .

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ment rights, ranking one as superior to the other. . . . But if the authors of those guarantees, fully aware of the potential conflicts between them, were unwilling or unable to resolve the issue by assigning to one priority over the other, it is not for us to rewrite the Constitution by undertaking what they declined to do.

\* In a footnote the Court described its determination of the issues: "[W]e sustain the contentions of all the petitioners under the First Amendment's guarantees of freedom of speech and of the press. . . ." *Id.* at 264, n.4.

The effect would be to shackle the First Amendment in its attempt to secure "the widest possible dissemination of information from diverse and antagonistic sources." \*

(Id. at 266; citations omitted)

*Cf. Garrison v. Louisiana, supra.*

The *Sullivan* actual malice standard has not been limited to the press in other settings. *See, e.g.: Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264 (1974) and *Linn v. United Plant Guard Workers*, 383 U.S. 53 (1966) (*Sullivan* standard adopted "by analogy" in the area of federal labor law); *Pickering v. Board of Education*, 391 U.S. 563 (1968) (dismissal of school teacher violated free speech rights in absence of proof of false statements knowingly or recklessly made).\*\*

Lower courts have applied the *Sullivan* principle to non-media defendants. *See, e.g.: Evans v. Lawson*, 351 F.Supp. 279 (W.D. Va. 1972) (members of private organization); *Silbowitz v. Lepper*, 32 A.D. 2d 520, 299 N.Y.S. 2d 564 (1st Dept. 1969) (postal worker suing union officer); *Cf. Davis v. Schuchat*, 510 F.2d 731, 734 n.3 (D.C. Cir. 1975) ("Our understanding of *New York Times* and its offspring is that private persons and the press are equally protected by the requirement that false comment about public figures must be knowing or in reckless disregard of the

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\* As Mr. Justice Goldberg noted in his concurring opinion, "[t]he theory of our Constitution is that every citizen may speak his mind and every newspaper express its view on matters of public concern. . . ." *Id.* at 298-99.

\*\* "It is therefore perfectly clear that, were appellant a member of the general public, the State's power to afford the appellee Board of Education or its members any legal right to sue him for writing the letter at issue here would be limited by the requirement that the letter be judged by the standard laid down in *New York Times*." *Id.* at 573.

truth in order to be actionable").\* No differential status for certain individuals or groups who perform functions under the Press Clause has been recognized. In *Lovell v. Griffin*, 303 U.S. 444 (1937), the distribution of a pamphlet and a religious magazine was held protected under the Press Clause because "every sort of publication which affords a vehicle of information and opinion" was encompassed by that Clause. *Id.* at 452. In *Mill v. Alabama*, 384 U.S. 214, 219 (1966), Mr. Justice Black forcefully reiterated the non-exclusive nature of the protection of the "press":

The Constitution specifically selected the press, which includes not only newspapers, books, and magazines, but also humble leaflets and circulars [citation omitted] to play an important role in the discussion of public affairs.

This Court has consistently declined to provide to the "institutional" press information or access to information not available to members of the general public. See, e.g.: *Nixon v. Warner Communications, Inc.* — U.S. —, 46 U.S.L.W. 4320, 4326 (U.S. April 18, 1978); *Pell v. Procunier*, 417 U.S. 817, 834 (1974); *Estes v. Texas*, 381 U.S. 532, 589 (1965).\*\*

A rule which distinguishes among recipients of the Press Clause grant of rights must inevitably involve the

\* See generally, for a discussion of state court decisions which have extended the *Sullivan* rule to non-media defendants, Eaton, "The American Law of Defamation Through *Gertz v. Robert Welch, Inc.* and Beyond: An Analytical Primer", 61 Virginia L. Rev. 1349, 1406-1407 and cases cited in notes 234-237 (1975).

\*\* In *Landmark Communications, Inc. v. Virginia*, *supra*, this Court held unconstitutional a state's attempt to punish a newspaper criminally for its truthful reporting of confidential judicial review commission proceedings. "Strangers" to the review proceedings were found protected by First Amendment guarantees in truthfully divulging those proceedings to the public. The Court did not limit the protection to the news media alone. 46 U.S.L.W. at 4391.

courts in determining when "the publishing business" is involved as well as who is encompassed within that industry. Such judgments have long been disfavored.\*

In *Branzburg*, Mr. Justice White found that the task of administering a constitutional newsman's privilege would involve the judiciary "on a long and difficult journey to . . . an uncertain destination":

Sooner or later, it would be necessary to define those categories of newsmen who qualified for the privilege, a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods.

(408 U.S. at 704)

See also: *Gertz*, *supra*, 418 U.S. at 346.

Judge Meskill, dissenting below, found that creation of special constitutional status for the editorial process would result in a preferential selection among persons equally situated under the First Amendment:

[B]efore the Court can recognize any special, preferred position for the press as an institution, it must necessarily recognize a distinction between personal

\* In *Bellotti*, *supra*, Chief Justice Burger wrote:

The second fundamental difficulty with interpreting the Press Clause as conferring special status on a limited group is one of definition. The very task of including some entities within the 'institutional press' while excluding others, whether undertaken by legislature, court or administrative agency, is reminiscent of the abhorred licensing system of Tudor and Stuart England—a system the First Amendment was intended to ban from this country. Further, the official undertaking that task would be required to distinguish the protected from the unprotected on the basis of such variables as content of expression, frequency or fervor of expression, or ownership of the technological means of dissemination.

(46 U.S.L.W. at 4381; citations omitted)

rights on the one hand and institutional rights on the other. . . . If we distinguish between institutional and personal rights to liberty of the press and place the former in a preferred position, then we necessarily place the latter in a subordinate position. The First Amendment interest of the public in having access to the truth is not necessarily better served by an institution than an individual.\*

(P50a; citations omitted)

Judge Oakes conceded his institutional reading of the Press Clause "creates an inconsistency between judicial treatment of the press on the one hand and non-press defendants on the other" (an inconsistency he suggests could be resolved by eliminating libel actions by public figure plaintiffs) (37a, n.25). He further urged that he was "not mak[ing] the distinction between the institutional press and the individual pamphleteer" but rather "between communicative functions properly protected under the Free Press clause and expression protected by the Free Speech guarantee" (43a, n.34). The flaw in Judge Oakes' analysis in his use of functional distinctions as a basis for elevating some institutions who perform the communicative function above others who also perform that function and above all who perform the expressional function.

In *Bellotti*, Chief Justice Burger found that the basic difference between the Press and Speech Clause was one of function:

The Speech Clause standing alone may be viewed as a protection of the liberty to express ideas and beliefs while the Press Clause focuses specifically on the liberty to disseminate expression broadly and 'comprehends every sort of publication which affords a vehicle

\* Cf. *Bellotti*, *supra*, 46 U.S.L.W. 4380 (Burger, C.J., concurring).

of information and opinion.' . . . Yet there is no fundamental distinction between expression and dissemination.

(46 U.S.L.W. at 4380; citation omitted)

However, the Chief Justice concluded that this functional difference afforded no basis to confer a preferred status on a limited group performing the press function:

Because the First Amendment was meant to guarantee freedom to express and communicate ideas, I can see no difference between the right of those who seek to disseminate ideas by way of a newspaper and those who give lectures or speeches and seek to enlarge the audience by publication and wide dissemination. "[T]he purpose of the Constitution was not to erect the press into a privileged institution but to protect all persons in their right to print what they will as well as to utter it. ' . . . the liberty of the press is no greater and no less . . . ' than the liberty of every citizen of the Republic." *Pennkamp v. Florida*, 328 U.S. 331, 364 (1946) (Frankfurter, J., concurring).

(*Id.* at 4381)

Mr. Justice Powell, for the majority, also concluded in *Bellotti* that the interests of the First Amendment would not be served by affording greater protection under that Amendment to the institutional press than to others:

If we were to adopt appellee's suggestion that communication by corporate members of the institutional press is entitled to greater constitutional protection than the same communication by appellants, the result would not be responsive to the informational purpose of the First Amendment.

(*Id.* at 4376, n.18)

### Other Considerations

Chief Judge Kaufman and Judge Oakes posited the editorial judgment privilege in terms solely applicable to the institutional press with its editors, broadcasters and editorial rooms. *Compare*: P 9a-11a and P 27a, P 32a, P 35a. An example of the anomaly which would thereby result may be found close to the instant case. Defendant Lando's answer avers that, following plaintiff's interview by Wallace for the program, he told Herbert he would "get" Herbert "by suing him for libel" (96a-97a, 112a). Assuming that such a libel suit had been commenced, Herbert would not be able to claim immunity from disclosing his state of mind, although Lando would be able to do so. Thus, the same protagonists would have vastly different rights in the judicial arena although the First Amendment ostensibly accorded both individuals its protection.

Other examples of the illogical results abound. A newspaper reporter writes a story charging a public figure with narcotics smuggling; a speaker at a drug-abuse seminar presents the same accusations. A television anchorman accuses a district attorney of corruption and perjury; a bar association official sends a newsletter to members making the same charges. A national newsmagazine presents an "exposé" of corruption and bribery involving two judges; a free-lance writer submits such an "expose" to a small muckraking magazine which publishes it. A public television network presents a film examining hospital services which states that a leading heart surgeon has caused the deaths of many patients due to negligent practices; a public service corporation produces a documentary film containing an identical attack which is distributed to public schools and colleges. In each of these instances only the member of the "institutional" media may conceal information concerning his intentions, conclusions, bases for conclusions and his views as to the credibility of sources

for such statements in a libel action brought by the person seeking to vindicate his or her reputation.\*

Even those who have argued that the Press Clause should be read expansively to recognize a special press status have not arrived at the same conclusion reached by Judge Oakes. It has been urged that this privileged position means that government must remain strictly neutral in its dealings with the press. "The government may not . . . single out the press for either conferral of a benefit or imposition of a burden." *See, e.g.*: Bezanson, *The New Free Press Guarantee*, 63 Virginia L. Rev. 731, 733-734 (1977). Subjecting the press to neutral government regulation broadly applicable to press and non-press alike would avoid the threat of governmental censure or control that might result if the state could pursue a policy of either special awards or sanctions for press institutions. The neutrality principle has led Professor Bezanson to conclude that the District Court order in the instant case was consistent with this theory, declaring the generally applicable discovery rules properly applied to these media defendants. "To exempt the press from such inquiry under legal requirements of general application . . . would constitute a breach of neutrality much like that rejected by the Supreme Court in *Branzburg v. Hayes*." *Id.* at 766.\*\*

The Press Clause serves a vital role in our society in providing First Amendment protection for communicative

\* Another danger of elevated rights for the institutional press was noted in *Davis v. Schuchat*, *supra*, 510 F.2d at 734, n.3: "[I]f the 'press' were given more protection than 'private speech', persons would be encouraged to rush allegations into wide publication rather than to carefully present them to informed parties for verification or refutation in a more private setting."

\*\* This analysis would explain the relationship between a concept of the institutional press' rights under the Press Clause and the rejection of the media's claim to special access and newsgathering rights in *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974) and *Pell v. Procunier*, *supra*. *Cf. Nixon v. Warner Communications, Inc.*, *supra*, 46 U.S.L.W. at 4326.

functions critical to the dissemination of information required to fulfill the basic aims of that Amendment. Neither the historical origins of the free press guarantee, nor the jurisprudential interpretations of First Amendment protections or the cases requiring protection of the press from certain governmental activities, support turning the Press Clause into a grant of special treatment more favorable than that afforded by the Free Speech Clause or into a bestowal of privileged status to a highly organized and institutionalized form of information dissemination. The result of Judge Oakes' analysis is to place the institutional media in a First Amendment position significantly higher than all others performing disseminational or informational functions and all performing the expressional functions of the Amendment. Such a result is not constitutionally sound. As eloquently declared by Chief Justice Burger in *Bellotti, supra*, 46 U.S.L.W. at 4381:

In short, the First Amendment does not 'belong' to any definable category of persons or entities: it belongs to all who exercise its freedoms.

### CONCLUSION

For the reasons stated, it is respectfully urged that the judgment of the Court of Appeals for the Second Circuit be reversed and that the Order entered by the District Court be reinstated in its entirety.

Respectfully submitted,

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## EXHIBITS

**Exhibit I**

29 November 1972

**MEMORANDUM FOR RECORD**

**SUBJECT:** Request for information and support to Barry Lando, CBS-60 Minutes

1. Yesterday Mr. Barry Lando, producer for 60-Minutes, visited OCINFO-PI to discuss the type of information and interview support he desired in preparation for a proposed segment for 60-Minutes, tentatively to be aired in January 1973 and concurrently with the release of LTC Herbert, USA-Ret, book *Soldier*.
2. Lando's stated premise is that Herbert is a liar and he has stated that if he can't develop a sufficient number of incidents in which Herbert's account can not be debunked, then there will be no story. There is no intent to puff Herbert and his book, although it is apparent that any network show, especially a controversial one, will have as a side effect, promotion of Herbert's book sales. On balance I believe it is to the best interests of the Army to cooperate selectively, supporting Lando's research and requests on the assumption that the basic premise stated above will not change. Perhaps the premise will change, if so we are not going to come out looking good.
3. In past research dating back to his original query to OASD(PA) on 8 March 1972, Lando has become very familiar with Herbert's stories and many inconsistencies therein. After an interview with members of the OCINFO staff on 13 March, Lando has been gathering data and talking with former associates of Herbert. On 27 June he had a filmed interview with MG Barnes during which the general addressed his relationship with Herbert.

2A

*Exhibit I*

4. At yesterday's meeting Lando asked that he be put in contact with several officers (see attached list) for the purpose of background interviews. No doubt he will ask that one or more of these men consent to a filmed interview at a later date. Lando also asked for factual data on the OPLAN MISSOURI story, Herbert's middle-east experiences, his Cuban experience, and the peace march at Ft. Leavenworth.

5. Mr. Lando has been advised that his point of contact for all queries related to this project is ASD(PA). Should he contact this office his request will be taken but no response will be given without ASD(PA) approval. Some of the individuals in whom he has interest are retired Army. PA assistance will be given to those retired personnel who seek it. This office will contact all of the individuals on the attached list and determine if they desire to talk to Lando. We will set up a schedule for those who agree.

/s/ LEONARD F. B. REED, JR.  
LEONARD F. B. REED, JR.  
LTC, GS  
Chief, News Branch, DAIO

1 Incl

3A

**Exhibit II**

**INTERVIEW REPORT**

Date: 4 Dec 72

**Interviewer and Affiliation:**

Barry Lando, CBS-60 Min

**Interviewee and Organization**

Col J Ross Franklin, USACDC

**Reported by:**

**Monitored by:**

LTC Reed

**Subjects Covered in Interview:**

1. Relationship with Herbert; reports of war crimes
2. Whereabouts on 14 Feb 69—provided 2 personal checks cashed in Hawaii
3. Evaluation of Herbert—excellent tactical commander who had a continuous propensity to lie and/or exaggerate
4. Reason for relief [sic]—lost confidence
5. The duck
6. Living conditions within the Bde Hq area
7. Franklin's own career
8. Torture in the MI compound

4A

*Exhibit II*

Brief Summary of Interview: *(Mandatory for sensitive intelligence subjects. Optional for all others.)*

Col Franklin was extremely candid in his remarks on all subjects, admitting where appropriate that he was not up to speed in possibly not having a complete grasp of all that was taking place in the MI compound. Lando persists in contention that he is interested in debunking Herbert—similar to Neil Sheehan's treatment of the Arnheiter Affair. Lando indicated that he has come to totally disbelieve Herbert. After the interview he informed me that Mike Wallace has agreed to do the narration and is equally convinced that the story is in debunking Herbert. Lando asserts that he has final decision on the segment and it will not go unless he can convincingly portray Herbert as the bad guy.

CINFO Form 75, 15 Sep 64

D27659

5A

**Exhibit III**

20 December 1972

MEMO FOR THE RECORD

SUBJECT: CBS 60-MINUTES SEGMENT ON LTC HERBERT

Barry Lando, producer of the subject program met with MG Sidle today to discuss his research to date and to request support for the production of the program. Lando indicated that his piece is aimed at debunking Herbert in his long fight against the Army. Further Lando indicated that he would focus some attention on the failure of the media to check out Herbert's story prior to "puffing him up." He plans to focus on four or five events which are contained in Herbert's book and factually destroy Herbert's credibility.

Lando requested assistance in obtaining filmed interviews with the following:

MG Sidle—discuss the press handling of Herbert and his promotion

Col Franklin—relationship with H. and war crimes allegations

LTC Nicholson—ditto (H) 717 249-2553

Maj Krouch—ditto

SGM Bittorie (Ret) the duck he didn't eat A/C 404/689-2994

Lando requested further assistance on the following subject areas:

off the record access of CID investigation or at least that portion relating Cpt Donovan's testimony

information regarding phone call from Buck Newman to Herbert

6A

*Exhibit III*

name of black Lt mentioned in Fact sheet who didn't want to go to field

information concerning MACV IG investigation of mistreatment of detainees by 172d MI det in Jun Jul 69

record of Herbert testimony supporting factsheet remark that Herbert stated under oath that he didn't report crimes to MG B rnes

Names of some of those whom Herbert allegedly struck  
Confirmation that Herbert was a member of Gemini recovery team in 64

Information of action surrounding withdrawal of Art 15

Request that OCINFO contact following to inform that Lando wants to talk to them on background

Ernesrt Webb- Maj- stationed USMA

Paul H. Ray-Maj- stationed SJA School (A/C 703-293-4730) Stiener-Col-stationed Ft Bragg

Information of the itinerary of War Heroes of Korean era (Search of Archives turns nothing.)

Gen Sidle indicated we would help as much as is possible within the bounds of propriety and command guidance.

Cy to

ASD (PA) A/v

/s/ LEONARD FB REED JR  
Leonard FB Reed Jr.  
LTC, GS

FILED

JUL 31 1978

MICHAEL SODAN, JR., CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1978

No. 77-1105

ANTHONY HERBERT,

*Petitioner,*

—against—

BARRY LANDO, MIKE WALLACE and CBS Inc.,

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SECOND CIRCUIT

**BRIEF OF RESPONDENTS**

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1978

No. 77-1105

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ANTHONY HERBERT,

*Petitioner,*

—against—

BARRY LANDO, MIKE WALLACE and CBS INC.,

*Respondents.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SECOND CIRCUIT

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**BRIEF OF RESPONDENTS**

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**Opinions Below**

The interlocutory decision and opinions of the United States Court of Appeals for the Second Circuit are reported at 568 F.2d 974 (2d Cir. 1977) and are set forth as Appendix A of the Petition. (1a-52a) The Memorandum and Order of the United States District Court is reported at 73 F.R.D. 387 (S.D.N.Y. 1977) and is reproduced in Appendix B of the Petition. (53a-89a) The Opinion and Order of the District Court certifying its prior Memorandum and Order is unreported and is reproduced in Appendix C of the Petition. (90a-98a)

## Jurisdiction

The Petitioner asserts that the jurisdiction of this Court arises under 28 U.S.C. § 1254(1) (1970).

## Question Presented

Whether a ruling of the United States Court of Appeals for the Second Circuit correctly held that the First Amendment to the United States Constitution provides protection against disclosure of the editorial process of the press in pre-trial discovery conducted in a libel case governed by *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

## Constitutional Provision Involved

The First Amendment to the United States Constitution provides:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

## Statement of the Case

### A. The Protagonists and the Program

The case arises out of a highly publicized dispute between Petitioner Anthony Herbert, a former lieutenant colonel in the United States Army, and the Army itself: Herbert claims that while on duty in Vietnam he observed and reported various war crimes to his superiors; the

Army flatly—and explicitly—denied that. Out of that extremely heated controversy, the instant litigation arises.

As summarized in the opinion of Chief Judge Kaufman, the facts giving rise to the litigation are as follows:\*

"In March 1971, Colonel Anthony Herbert achieved national importance when he formally charged his superior officers, Brigadier General John W. Barnes and Colonel J. Ross Franklin, with covering up war crimes in Vietnam. Herbert claimed, in documents filed with the U.S. Army Criminal Investigation Division (CID), that he had witnessed numerous atrocities while commanding a battalion of the 173rd Airborne Brigade. The most horrifying involved the murder of four prisoners of war by South Vietnamese police in the presence of an American advisor, who callously failed to intervene. Since those killings allegedly occurred on February 14, 1969, Herbert dubbed them the 'St. Valentine's Day Massacre.'

"Herbert claimed to have reported all atrocities immediately to Colonel Franklin, deputy commander of the 173rd Airborne, at Brigade Headquarters in Vietnam, and to have brought several to the attention of

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\* Judge Meskill, dissenting from the decision of the Court of Appeals for the Second Circuit, did not dispute the accuracy—or tone—of any of the facts as set forth by Judge Kaufman. Petitioner has contented himself with the observation that the description by Judge Kaufman of "the Program itself . . . , the underlying facts and the course of discovery . . . is inaccurate." (Pet. Br. 8n\*-9n) Petitioner's brief does not purport to set forth in the slightest degree how or in what manner Judge Kaufman's description of the facts is "inaccurate"; instead, Petitioner observes that "at this stage" all such matters are "not relevant." (*Id.*; emphasis added) Apart from the dubious propriety of accusing a Court of Appeals with filling seven pages of its opinion with unstated inaccuracies, such a position is, to say the very least, inconsistent with the posture of the party who sought to persuade this Court to take the uncommon step of considering this interlocutory appeal.

the Brigade's commander, General Barnes. But, Herbert alleged, neither was interested in investigating the incidents. When Herbert persisted in pressing his charges, he said that he was abruptly relieved of his command, a determination that was subsequently affirmed by a military appeals tribunal. His removal as battalion commander was attributed to a poor efficiency report authored by Colonel Franklin, which accused Herbert of having 'no ambition, integrity, loyalty or will for self-improvement.'

"Herbert's sudden fall from grace surprised many observers. His long career in the military had been exemplary; under his strong leadership, the second battalion had exhibited extraordinary prowess in battle. His military acumen had earned Herbert one Silver and three Bronze stars, and he had recently been recommended to receive the Distinguished Service Cross.

"Herbert's story fascinated an American public that was increasingly becoming disenchanted with the Vietnam War. In July 1971, he was interviewed by Life Magazine; that September, James Wooten of the New York Times wrote an article favorable to Herbert titled 'How a Supersoldier Was Fired From His Command.' Interviews with the television personality Dick Cavett followed which, according to Cavett, elicited a level of viewer response unmatched by any other single program. In October 1971, Congress became embroiled in the 'Herbert affair' when Rep. F. Edward Hebert, Chairman of the Armed Services Committee, convinced the Army to remove Herbert's poor efficiency report from his military record.

"The Army also thoroughly investigated Herbert's charges of war crimes and, in October 1971, exonerated General Barnes. Armed with this new informa-

tion, reporters began for the first time to critically examine the veracity of Herbert's story. During this period of intense public interest, Herbert announced his retirement from the service. He cited, as the reason for his decision, incessant harassment by the military because of his disclosures.

"Barry Lando, an associated producer of the CBS Weekend News, was one of the many individuals interested in the Herbert story. He interviewed Herbert in June 1971 and later produced a laudatory report which was televised on July 4, 1971 over the CBS network.[\*] A year later, Lando had become a producer for CBS's documentary news program, '60 Minutes.' He decided to investigate both Herbert's military career and his charges of cover-up for a comprehensive broadcast on the ensuing controversy. Lando interviewed not only Herbert, Franklin and Barnes, but questioned others, both in and out of the military, who could corroborate Herbert's claims that he had reported war crimes, and that the military had en-

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\* In his Petition for Certiorari filed with this Court, Petitioner asserted, in response to this sentence, that "[n]o such report exists." (Pet. 9n\*) A reading of the Petition would suggest that Judge Kaufman had invented the entire matter. In fact, a report prepared by Barry Lando *did* exist and *was* aired on CBS on July 4, 1971.

Apparently Petitioner's sole complaint is thus with the characterization of the report as "laudatory." The report consisted primarily of an interview in which Herbert described problems he had allegedly encountered with the military. In the context of a case where the purported defamation is an alleged implicit characterization of Herbert as a liar, it seems clear that a report devoted almost entirely to his description of his views of his difficulties with those who criticized him is plainly "laudatory." More significantly for present purposes, Petitioner's failure to set forth all facts relevant to this matter is illustrative of the problem of trying to test Herbert's assertion that he has been or will be substantially handicapped in his presentation of his case in the absence of any factual findings made by the District Court and reviewed by the Court of Appeals.

gaged in a systematic whitewash. Indeed, some of the leads which Lando pursued may have been supplied by Herbert himself during their repeated and extensive conversations. Lando focused on particular allegations. He spent some time in attempting to assay whether Herbert had, in fact, reported the St. Valentine's Day Massacre to Franklin in Vietnam on February 14, 1969. Since Franklin protested that he was returning from Hawaii on that date, Lando concentrated on this point. Lando obtained Franklin's hotel bill and a cancelled check in payment of that bill, and interviewed others who could verify Franklin's activities on the crucial days. Lando also questioned Captain Bill Hill, upon whom Herbert relied to substantiate his story. When Hill recalled that Herbert reported war crimes to someone, he could not say with total certainty that Franklin was the individual.

"Other allegations were also considered. Lando investigated Herbert's activities during the eighteen-month period between his relief from command and the filing of formal war crimes charges to determine whether Herbert had apprised other officers in Vietnam of his accusations. In particular, Lando interviewed the highest ranking military lawyer and judge in Vietnam at the time, Colonel John Douglass, who emphatically controverted Herbert's assertion that war crimes had been brought to his attention. Lando also elicited from Kenneth Rosenbloom, the military attorney and investigator who conducted the Army's inquiry into Herbert's allegations, the view that the military's handling of the charges was beyond reproach.

"Lando also questioned soldiers who had served under Herbert to determine his qualities as commander. One of these, Sergeant Bruce Potter, reported occasions upon which Herbert had countenanced the

commission of war crimes. Potter recounted, for example, an incident in which Herbert had thrown a sand bag out of a helicopter to frighten a war prisoner on the ground into thinking it was a fellow prisoner who had been ejected.

"During this period, Lando received an uncorrected proof of 'Soldier,' a book written by Herbert in collaboration with James Wooten of the New York Times. Although several of those interviewed by Lando attested to the verity of many of Herbert's reports, others did not. Thus, Herbert wrote that Captain James Grimshaw had once attempted to drive certain Viet Cong soldiers from a cave without injuring female civilians and children by valiantly entering their hiding place alone. Grimshaw, however, denied the incident had occurred.

"Lando's research culminated in the telecast of 'The Selling of Colonel Herbert' on February 4, 1973. That evening, the American people were presented with a fallen hero. The presentation on the air initially juxtaposed Herbert's claims and the denials of Franklin and Barnes that Herbert ever reported war crimes, and then considered in detail five aspects of the Herbert affair:

- "(1) Lando's doubts that Franklin was even present in Vietnam to hear of the St. Valentine's Day Massacre;
- "(2) Colonel Douglass's adamant denial that war crimes had been reported to him;
- "(3) Kenneth Rosenbloom's defense of the Army's investigation;
- "(4) Bruce Potter's recount of the helicopter incident; and

"(5) James Grimshaw's flat contradiction of his alleged heroism in the cave.

"While the existence of information corroborative of Herbert's claims was alluded to on the broadcast, the program as a whole clearly cast doubt upon all of Herbert's allegations. The telecast concluded with a plea that the Army make its records public to the end of conclusively settling the imbroglio." (Pet. 13a-18a)

### B. Litigation and Discovery

In this defamation action relating to the segment of "60 MINUTES" dealing with the Herbert-Army dispute, Herbert has sued Respondents CBS Inc. ("CBS") and Messrs. Lando and Wallace, respectively the individual producer of and correspondent for the segment.

Apart from the many factual issues as to which the parties differ,\* many legal issues remain to be resolved. They

\* Much of Petitioner's brief is filled with questionable and sometimes inaccurate factual materials and assertions. Many of them (such as the exhibits to Petitioner's brief) were not even before the District Court; others were not urged upon the Court of Appeals. For example—and as if this were an appeal by Herbert after a finding on the merits for CBS—Petitioner sets forth a barrage of statements designed to demonstrate that CBS portrayed Herbert as a person capable of brutality but that CBS did not present enough material rebutting that charge. (Pet. Br. 9-12) Among the many types of factual material omitted from Petitioner's brief are (a) portions of the dialogue on the program itself in which General Barnes is forced *by Lando* to admit that he had "no hard evidence" that Herbert was—as the General had alleged—a "killer" (App. 44a) and answers by Herbert himself to all charges of brutality (App. 54a, 55a); (b) the fact that statements of one witness that Herbert had beaten Viet Cong prisoners had been widely reported in newspaper accounts throughout the country prior to the "60 MINUTES" segment (Exs. 22(j), 22(k)); (c) the fact that Lando's notes of his interview with Brown confirm charges made by Stemmiess about Herbert (Ex. 181, Tr. 915-17); (d) statements to the effect that Herbert had abused Ameri-

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include, among others, serious questions which CBS will raise at appropriate and later stages of the case as to (a) whether the broadcast can properly be held to be defamatory, *Buckley v. Littell*, 539 F.2d 882 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977); (b) whether, in any event, CBS may conceivably be held liable for a broadcast which is a combination of protected "neutral reportage" about the views of public figures *vis-a-vis* each other, *Edwards v. National Audubon Society, Inc.*, 556 F.2d 113 (2d Cir.), *cert. denied*, 98 S.Ct. 647 (1977) and protected opinion, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); and (c) whether Petitioner's novel theory of liability in libel cases is consistent with *any* prior ruling of this Court.\*

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can enlisted men (Ex. 175, Tr. 2328-29; Ex. 34; Ex. 221, 22ii; Ex. 32, pp. 1-10).

Similarly, in his section about Herbert's reporting of war crimes (Pet. Br. 12-14), Petitioner claims it is established that Colonel Franklin "admitted" he sometimes "tune[d]-out" when Herbert spoke with him and thus may not have heard Herbert report war crimes. What Petitioner omits is, *inter alia*, that Franklin repeatedly denied that he could have "tuned-out" on a report that six people were murdered. (Ex. 102, pp. 3, 9, 11-12) Petitioner's brief also omits reference to much material hostile to Herbert which CBS gathered but did not broadcast—*e.g.*, that one soldier described Herbert as a "ruthless man who would not hesitate to lie to preserve his own reputation" (Ex. 85) and also quoted as the reason for Herbert's removal from command Herbert's remark that "I didn't come over here to pacify these people, I came over here to kill gooks." (Ex. 178, p. 10)

These illustrations hardly exhaust the many demonstrable factual errors and omissions that fill Petitioner's brief. We cite them simply to suggest that (a) Petitioner's factual assertions may not, even on this appeal, be taken as accurate, let alone proved, and (b) there is difficulty in any review by this Court at this stage of a complex litigation where neither the District Court nor the Court of Appeals has had the opportunity to review and rule upon the Petitioner's factual allegations.

\* Petitioner appears to maintain that the broadcast of statements by the participants in a controversy may give rise to some form of "libel by omission," a libel where one side is supposedly given more time and one or another allegation of the "other" side

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Whatever the areas of dispute in the case, there has been no question that Herbert is a public figure or public official—or both—and that the case is therefore governed by principles set forth in *New York Times Co. v. Sullivan*, *supra*, and its progeny.

By agreement of counsel, Herbert was permitted to begin and complete discovery of defendants Lando, Wallace and CBS before the commencement of defendants' discovery of Petitioner. Herbert's discovery began with the production of thousands of pages of documents by the defendants; Herbert's attorneys also attended screenings of the televised segment and related filmed interviews.

Herbert's deposition of Lando began on August 1, 1974 and was concluded, over a year later, subject to a ruling by the District Court on disputed areas. The deposition was exhaustive in its scope. Indeed, as summarized by Chief Judge Kaufman:

"The sheer volume of the transcript—2903 pages and 240 exhibits—is staggering. Lando answered innumerable questions about what he knew, or had seen; whom he interviewed; intimate details of his discussions with interviewees; and the form and frequency of his communications with sources. The exhibits produced included transcripts of his interviews; volumes of reporters notes; videotapes of interviews; and a series of drafts of the '60 Minutes' telecast. Herbert also

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is omitted. Cf. *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369, 366 N.E.2d 1299, 397 N.Y.S.2d 943, *cert. denied*, 98 S.Ct. 514 (1977). In effect, Herbert argues, libel law permits the imposition of liability for the supposed violation of what appears to be an extraordinarily altered version of the FCC's "fairness doctrine." Respondents contend that this is not the law. The Courts below have not had occasion to rule on Petitioner's theory.

discovered the contents of pre-telecast conversations between Lando and Wallace as well as reactions to documents considered by both." (Pet. 18a-19a; footnote omitted)\*

The questions to which objections were raised and which became the subject of Petitioner's Rule 37 motion relate, in the main, to matters which did not even appear in the broadcast. They involve Lando's beliefs, opinions, intent and conclusions; they range from questions designed to elicit "Lando's conclusions during his research and investigation regarding people or leads to be pursued, or not to be pursued . . ." to other questions which inquire into "Lando's intentions as manifested by the decision to include or exclude material." (Pet. 57a-58a)

Illustrative questions include:

\* Petitioner's intimation that Lando and CBS waived their First Amendment rights by responding to questions other than the ones at issue on this appeal is one which was not made to the Court of Appeals and therefore should not be considered at this time. See, e.g., *First National Bank v. Cities Service Co.*, 391 U.S. 253, 280 n.16 (1968). Moreover, to the extent waiver is to be at issue, it should surely be considered in the first instance by the District Court rather than by this Court. In any event, the waiver argument of Petitioner is wholly without substance. To the extent cases relied upon by Petitioner (Pet. Br. 31-32) relate to parties who commenced actions and then refused to respond to questions with respect thereto (*Anderson v. Nixon*, 444 F.Supp. 1195 (D.D.C. 1978); *Lyons v. Johnson*, 415 F.2d 540 (9th Cir. 1969), *cert. denied*, 397 U.S. 1027 (1970)), they are facially distinguishable from the instant case; and to the extent the cases involve privileges which are not constitutionally based (*Haymes v. Smith*, 73 F.R.D. 572 (W.D.N.Y. 1976); *Hearn v. Rhay*, 68 F.R.D. 574 (E.D. Wash. 1975)), they are equally inappropriate. The only other case relied upon is an unreported Maryland case (*Jenoff v. Hearst Corp.*, No. H75-692 (D.Md. Jan. 20, 1978)) which itself rejects the Court of Appeals' ruling at issue here—and was, we submit, incorrect in doing so for all the reasons elaborated in this brief. It should finally be noted that under *Sullivan* itself, proof of reckless disregard is, in any event, the burden of the plaintiff. (376 U.S. at 279-80)

- whether Lando had “considered making a comment” in the broadcast “about the Army or Pentagon representatives going to military installations to speak against Col. Herbert” (p. 523);\*
- whether Lando had at any time proposed to include in the broadcast “a reference” to the Pentagon representatives who had spoken at Army bases with respect to Col. Herbert (p. 524);
- whether Lando “ever came to a conclusion” that it was unnecessary “to interview one individual” (p. 666);
- what “the basis” was for Lando’s decision to interview one soldier three times and not to interview another soldier (p. 667);
- what “the basis” was for including in the broadcast a statement by one individual and not another regarding Herbert’s treatment of Vietnamese (p. 876);
- whether Lando had “propose[d] to include in the program” certain favorable statements about Herbert (p. 877);
- and a wide variety of other questions relating to the editorial selection process by which CBS and its employees determined what to include in the “60 MINUTES” segment relating to Herbert.

When Lando, on advice of counsel, declined to respond to these and related questions, Petitioner sought an order compelling discovery pursuant to Fed.R.Civ.P. 37(a)(2).

### C. The District Court Opinion

On January 4, 1977, the Hon. Charles S. Haight, Jr., U.S.D.J., entered a Memorandum and Order directing Re-

\* References to “p....” are to pages of the Lando deposition, which was part of the record on appeal in this matter.

spondents to respond to essentially all the disputed discovery sought by Petitioner. (Pet. 53a-89a) After observing that the case was “one of first impression” (Pet. 61a), the District Court concluded that given the already “heavy burden of proof” (Pet. 61a-62a) upon a public figure plaintiff in a *Sullivan*-governed libel suit, the Petitioner was particularly entitled to “liberal interpretation of the rules concerning pre-trial discovery.” (Pet. 62a) Such an interpretation, the District Court concluded—citing a ruling of Judge Lumbard in which First Amendment considerations were not even present\*—would permit discovery of “‘almost anything that will help the examining party to discover any leads to evidence.’” (Pet. 63a; emphasis added)

All claims of First Amendment protection—or even the relevance of First Amendment considerations to the scope of the discovery sought—were summarily rejected by the District Court. Cases cited by CBS to demonstrate the extraordinary breadth of protection afforded the press in its editorial decision-making process\*\* were distinguished on their facts and rejected insofar as they were urged to set forth relevant bodies of law: “[t]hese cases”, the District Court concluded, “have *nothing to do* with the proper boundaries of pre-trial discovery in a defamation suit alleging malicious publication.” (Pet. 67a; emphasis added)

On February 22, 1977, having received a request from Respondents seeking certification of the decision pursuant to 28 U.S.C. § 1292(b)(1970), and an opposition thereto

\* *United States v. Matles*, 247 F.2d 378, 383 (2d Cir. 1957), *rev’d on other grounds*, 356 U.S. 256 (1958).

\*\* *E.g.*, *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (“*Tornillo*”); *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973) (“*CBS*”).

from Petitioner, the District Court entered a new Memorandum Opinion and Order, amending its previous decision and making the findings required by § 1292(b) as a prerequisite to interlocutory appeal. (Pet. 90a-98a) By order entered without opinion on March 17, 1977, the United States Court of Appeals for the Second Circuit granted the petition for leave to appeal.

#### **D. The Decision of the Court of Appeals**

The Court of Appeals, in opinions of Chief Judge Kaufman and Judge Oakes, reversed the decision of the District Court; Judge Meskill dissented.

Judge Kaufman divided the questions at issue on appeal into five categories:\*

- "1. Lando's conclusions during his research and investigations regarding people or leads to be pursued, or not to be pursued, in connection with the '60 Minutes' segment and [a subsequent magazine article by Lando];
- "2. Lando's conclusions about facts imparted by interviewees and his state of mind with respect to the veracity of persons interviewed;

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\* Although the scores of specific discovery questions at issue were included in the record on appeal, the Court of Appeals was neither asked, by either side, nor did it choose to deal with each specific question. Instead, it limited its consideration to the categories described above, leaving for the District Court the task of evaluating whether specific questions asked of Lando fell within the scope of that which the opinion held was protected under the First Amendment. See Pet. 46a (Opinion of Oakes, J., concurring). Another of Petitioner's newly conceived assertions to this Court is that the Court of Appeals erred in failing "to examine the materials discovered and the matters presented on the program. . . ." (Pet. Br. 8) This position is utterly inconsistent with Petitioner's failure to request any such examination below. It is, as well, at odds with Petitioner's failure to print any such material in the Appendix submitted to the Court of Appeals—or to this Court.

- "3. The basis for conclusions where Lando testified that he did reach a conclusion concerning the veracity of persons, information or events;
- "4. Conversations between Lando and Wallace about matter to be included or excluded from the broadcast publication; and
- "5. Lando's intentions as manifested by his decision to include or exclude certain material." (Pet. 19a-20a)

Both Judge Kaufman and Judge Oakes emphasized the important protection afforded the editorial process of the press by the First Amendment, a protection each found reflected in this Court's decisions in *Tornillo* and *CBS*. Analyses of those cases, this Court's holdings in *New York Times Co. v. Sullivan* and its progeny, and the emerging body of district and appellate court decisions dealing with procedures to be used in libel suits are set forth at length in their respective opinions and are dealt with throughout this brief. The opinions conclude that to ignore First Amendment considerations, as had the District Court, and to allow discovery of the editorial process as reflected in the five categories of questions at issue would have an impermissibly inhibiting effect on the press in the performance of its editorial functions. Accordingly, the Court of Appeals reversed the District Court's order compelling discovery as to such matters and remanded the matter to the District Court in order that the principles enunciated by the Court of Appeals might be applied to the specific questions posed in discovery.

Judge Meskill dissented. His opinion acknowledged that responses to the questions at issue would have "a 'chilling' or deterrent effect," but urged that judicial review "is supposed to" chill, since "[t]he publication of lies should be

discouraged." (Pet. 46a) Judge Meskill acknowledged that:

"If the press were forced to disclose all of the ideas and theories that are explored during the editorial process, then intellectual exploration itself would be discouraged—without necessarily, or even probably, deterring irresponsible journalism. By thus discouraging 'the creative verbal testing, probing, and discussion of hypotheses and alternatives which are the *sine qua non* of responsible journalism,' [Pet. 13a]; see [Pet. 41a-42a] (Oakes, J., concurring), discovery of the communications sought under category four could have an incremental chilling effect not built into the *New York Times v. Sullivan* libel action." (Pet. 51a)

Nonetheless, he concluded that no protection should be afforded the press against compelled disclosure of just such communications.

### Summary of Argument

In its recent rulings in cases involving the press, this Court has imposed stringent limits on all forms of governmental action which interfere with the decision-making process by which the press determines what to publish or broadcast. As phrased by the Court in *Tornillo*, "[g]overnmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers." (418 U.S. at 256) Accordingly, prior restraints on that which is to be printed or broadcast have been all but totally forbidden, as have acts of governmental compulsion as to what to print or broadcast.

The vice of the District Court's ruling in the present case was its holding that the fundamental protections which

*Tornillo* and other rulings of this Court secured against governmental interference with the editorial process of the press have "nothing to do" (Pet. 67a) with what degree of discovery into that same process may be judicially compelled in a *Sullivan*-governed libel case. After first setting forth the context of this appeal—*e.g.*, the enormous discovery already had, the inconsistency of still further discovery with the intentions of the drafters of the Federal Rules—Part I of this brief deals with the nature of the District Court's error and the correctness of the ruling of the Court of Appeals.

Disclosure of the editorial process of the press would inhibit the "full and candid discussion within the newsroom itself" (Pet. 11a; opinion of Kaufman, C.J.) which lies at the very heart of the editorial process. The need for protection against the compelled disclosure of decision-making processes such as the editorial process of the press which are charged with societal and constitutional significance has long been recognized for each branch of the federal government. The dangers attendant upon compelled disclosure of deliberative and mental processes are, we argue, no less real and threatening for the press.

Moreover, this Court has held on numerous occasions that exacting judicial scrutiny is required where there is even the potential that governmental action may inhibit the exercise of First Amendment rights. Application of this sensitive legal test, especially in light of the privileges accorded each branch of government to protect its deliberative processes, compels the conclusion that the Court of Appeals was correct in holding that the editorial process of the press must be protected against compelled disclosure in *Sullivan* libel cases.

Compelled disclosure of the editorial process also threatens the capacity of the press to perform its his-

torically established role as a watchdog against abuse of power by government officials and other public figures. The mutual autonomy of press and government prescribed by our Constitution is, we urge, seriously threatened by the District Court's ruling, which permits the same public officials and public figures against whom the press is to guard to compel disclosure of the editorial process by which the press decides what, if anything, to publish or broadcast about them.

By reference to pre-Revolutionary history and the history of the adoption of the First Amendment, we demonstrate that the autonomous and central role accorded the press under the press clause of the First Amendment is a direct and deeply felt response to such repressive measures as were levelled against the press in England and colonial America. The history of the press in pre-Revolutionary England and America illustrates the source and the wisdom of the press clause's protection of the autonomous communicative function of the press *vis-a-vis* government. This constitutionally critical function cannot, we submit, be performed if the government is permitted to use an equally autonomous function, such as a discovery order, to intrude into the editorial functions of the press.

In Part II of this brief, we demonstrate that the decision of the Court of Appeals is entirely consistent with the holding and underlying policies of *New York Times Co. v. Sullivan*. The Second Circuit's ruling, like prior decisions of other district and circuit courts, implements the substantive law of libel as set forth in *Sullivan* while protecting First Amendment interests against any threat arising from the procedural rules governing civil litigation generally. In so ruling, the Court of Appeals did not alter in any way the substantive law of libel as set forth in *Sullivan* and its progeny. Nor has the Court of Ap-

peals ruling "effectively eliminated"—as Petitioner urges (Pet. Br. 3)—the possibility that Petitioner or any other *Sullivan* plaintiff will be able to prove actual malice as defined by *Sullivan*. Actual malice in *Sullivan* libel cases typically is inferred from objective facts. If actual malice were in fact present here, Petitioner could infer from the "staggering" (Pet. 19a; opinion of Kaufman, C.J.) amount of material already discovered in this case an objective manifestation of actual knowledge of falsity or reckless disregard for the truth. As in the past, it remains open to plaintiffs in *Sullivan*-governed libel cases to prove actual malice by submitting to the jury objective facts from which inferences, if appropriate, may be drawn, without directly invading the editorial process of the press.

## ARGUMENT

### Introduction: The Herbert Case and Pre-Trial Discovery

Before turning to the large First Amendment issues raised by this appeal, we turn to the context out of which the appeal arises. That context is one in which elephantine discovery of Lando and CBS has already occurred; at a time of increasing recognition that discovery abuses of the Federal Rules of Civil Procedure pose an ever-growing threat to the functioning of the American judicial system; and in which the trial court nonetheless premised its opinion requiring still more discovery on its avowedly "liberal interpretation" of the discovery rules. (Pet. 62a-63a)

The enormity of the scope of the pre-trial discovery that has already transpired can hardly be disputed. Twenty-six deposition days have been devoted to the deposition of Lando alone; they consume 2,903 pages of transcript, as well as 240 exhibits. The "sheer volume of the transcript"

is, as Judge Kaufman stated and this Court may observe, "staggering." (Pet. 19a) It is filled "in minute detail" with "what Lando knew, saw, said and wrote during his investigation." (Pet. 22a)

This Court has already observed, in a context far removed from First Amendment issues, that there is immense potential for "possible abuse of the liberal discovery provisions of the Federal Rules of Civil Procedure." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 741 (1975).<sup>\*</sup> Other courts have commented on the peculiarly threatening aspects of such discovery in a First Amendment context. In *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Board*, 542 F.2d 1076 (9th Cir. 1976), *cert. denied*, 430 U.S. 940 (1977), for example, the Court of Appeals for the Ninth Circuit affirmed the dismissal with prejudice of a complaint which challenged, as violative of the antitrust laws, activities which the Court concluded were at least *prima facie* entitled to First Amendment protection as exercises of the right to associate and petition the government. In its opinion affirming the dismissal, the Court observed that:

"The Supreme Court has consistently recognized the sensitivity of First Amendment guarantees to the threat of harassing litigation, and has erected barriers to safeguard those guarantees. See e.g., *Time, Inc. v. Hill*, 1967, 385 U.S. 374, 387-91, 87 S.Ct. 534, 17 L.Ed.2d 456; *New York Times Co. v. Sullivan*, 1964, 376 U.S. 254, 267-83, S.Ct. 710, 11 L.Ed.2d 686; *N.A.A.C.P. v. Button*, 1963, 371 U.S. 415, 431-33, 83 S.Ct. 328, 9 L.Ed.2d 405. Because we think that similar values are endangered in this case, we hold that in

<sup>\*</sup> The Court has also indicated that the First Amendment may afford protection for otherwise discoverable material. *Fisher v. United States*, 425 U.S. 391, 401 (1976).

order to state a claim for relief under the *Trucking Unlimited* exception, a complaint must include allegations of the specific activities, not protected by *Noerr*, which plaintiffs contend have barred their access to a governmental body. . . .

"In holding that plaintiffs' allegations are insufficient in this case, we are not adopting a rule that so-called 'fact' pleading, as distinguished from 'notice' pleading, is required in antitrust cases. We repudiated that notion in *Walker Distributing Co. v. Lucky Lager Brewing Co.*, 9 Cir. 1963, 323 F.2d 1, 3-4. What we do hold is that in any case, whether antitrust or something else, where a plaintiff seeks damages or injunctive relief, or both, for conduct which is *prima facie* protected by the First Amendment, the danger that the mere pendency of the action will chill the exercise of First Amendment rights requires more specific allegations than would otherwise be required.

\* \* \*

"The Supreme Court seems now to be aware of a fact long known to practitioners. The liberal discovery rules of the Federal Rules of Civil Procedure offer opportunities for harassment, abuse, and vexatious imposition of expense that can make the mere pendency of a complex lawsuit so burdensome to defendants as to force them to buy their peace regardless of the merits of the case." (542 F.2d at 1082-83)<sup>\*</sup>

<sup>\*</sup> Still more recently, in *Maheu v. Hughes Tool Co.*, 569 F.2d 459 (9th Cir. 1978), the same court has had occasion to state:

"Rule 1 of the Federal Rules of Civil Procedure, as adopted nearly 50 years ago, states the high hopes of the draftsmen: the rules 'shall be construed to secure the just, speedy, and inexpensive determination of every action.' Something in the Federal civil procedure has gone very much awry. Where now is speedy and inexpensive determination?" (569 F.2d at 462)

In this context, we submit, Judge Oakes was plainly correct in viewing the case as an invitation "to set some limits in *Sullivan* cases on the untrammelled, roving discovery that has become so prevalent in other types of litigation in today's legal world." (Pet. 25a)

"Today's legal world" referred to by Judge Oakes is one so far removed from that contemplated by the draftsmen of the Federal Rules that this case may well serve as a paradigm—and a basis for change. Charles Clark, the Reporter of the Advisory Committee appointed by the Supreme Court to draft the Federal Rules, observed prior to their passage that:

"An important section of the proposed rules is that making provision for discovery and summary judgment in accordance with the general trend of procedural reform in England and in this country, since *these are devices which aid enormously in the speedy ascertainment of the real issues involved in litigation and their expeditious adjudication*. They are natural corollaries to supplement the system of the extremely flexible and broad pleading to which I have just referred. The requirements of pleading and allegation should not be strict, so that no person shall be deprived of his rights by the chance act or ignorance of his lawyer. *But if there results any indefiniteness about the issues or the points in dispute, it can be cleared up effectively (as no purely pleading rule has ever succeeded in accomplishing) by those devices of discovery and summary judgment which enable one upon stating his own case explicitly to obtain a like statement from his opponent—so explicit in fact that the case in half or more of the instances is ready for immediate judgment.*" (Emphasis added)

Clark, *The Proposed Rules of Civil Procedure*, 22 A.B.A.J. 447, 450 (1936).

The expectation that the new discovery rules would serve to reduce the costs, as well as the length, of litigation was given expression in treatises on discovery published at the time of the promulgation of the Rules. P.S. Dyer-Smith, for example, included as one of the "advantages of the modern, liberal discovery system," *Federal Examinations Before Trial and Depositions Practice* § 6, at 5 (1939), the following:

"When the case goes to trial, the issues to be tried are much simpler and fewer than they would have been without discovery. Because of these reasons the time of the Court and counsel is saved, and the cost of litigation is considerably decreased, in spite of the cost of obtaining the discovery." (*Id.*)

Similarly, among the "chief benefits arising from the availability and operation of a liberal discovery procedure," 4 J. Moore, *Federal Practice* ¶ 26.02[2], at 26-65 (2d ed. 1976), listed in the first edition of Professor Moore's treatise was the following:

"It makes available in a simple, convenient, and often inexpensive way facts which otherwise could not have been proved, except with great difficulty and sometimes not at all." (*Id.*)\*

\* See also Sunderland, Foreword to G. Ragland, *Discovery Before Trial* (1932):

"It is probable that no procedural process offers greater opportunities for increasing the efficiency of the administration of justice than that of discovery before trial. Much of the delay in the preparation of a case, most of the lost effort in the course of the trial, and a large part of the uncertainty in the outcome, result from the want of information on the part of litigants and their counsel as to the real nature of the respective claims and the facts upon which they rest." (*Id.* at iii)

As this case well demonstrates, however, what has too often developed in recent years is utterly inconsistent with the intentions of the draftsmen of the Federal Rules. Instead of producing economical and expeditious litigation, the discovery rules have led to a mire of delay and expenditure all too reminiscent of Dickens' *Jarndyce v. Jarndyce*.<sup>\*</sup> As Chief Justice Burger has observed:

"Now, however, after more than 35 years' experience with pretrial procedures, we hear widespread complaints that they are being misused and overused. Increasingly in the past 20 years, responsible lawyers have pointed to abuses of the pretrial processes in civil cases. The complaint is that misuse of pretrial procedures means that 'the case must be tried twice.' The responsibility for correcting this lies with lawyers and judges, for the cure is in our hands."

*The Pound Conference*, 70 F.R.D. 79, 95-96 (1976).<sup>\*\*</sup>

<sup>\*</sup> C. Dickens, *Black House* (1853).

<sup>\*\*</sup> See also Lasker, *The Court Crunch: A View from the Bench*, 76 F.R.D. 245, 249-50 (1977):

"When on September 16, 1938 the Federal Rules of Civil Procedure became effective, it was widely considered that their lucidity, simplicity, comprehensiveness and structural unity—to say nothing of their pleading and discovery philosophy—would radically improve the litigation process in federal courts. The objective of the Rules was stated, in Rule 1, to be 'To Secure the Just, Speedy, and Inexpensive Determination of Every Action.'

"Today there is a large body of opinion that in spite of the practical and beneficent aims of the Rules—and, some critics suggest, in part because of those aims—the federal courts and litigants face a crisis in which determinations are not always just, rarely speedy and never inexpensive." (Emphasis in original)

• • •

"It is widely recognized that the special irony of the success of the federal rules is that what was created for the purpose of simplification has often ended in complication. While this

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Subsequent to the Pound Conference, actions have commenced to deal structurally with certain problems of discovery abuse.<sup>\*</sup> But the instant case raises, in concrete fashion, a distinct question: whether Charles Clark and the other draftsmen who believed the Federal Rules would lead to simpler, less expensive litigations could possibly have contemplated 26 deposition days for *one* witness, a demand for still further discovery, and a district court determination requiring the additional discovery on the ground that discovery should be "liberal" and is permitted as to "almost anything." (Pet. 63a) That such a decision was rendered in the name of the Federal Rules is, we submit, a perversion of the purposes of those Rules;

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generalization may be no more trustworthy than any other, it is nevertheless true—as we all know—that pre-trial procedure, and discovery in particular is often abused."

See also Stanley, *President's Page*, 62 A.B.A.J. 1375 (1976):

"Designed with the hope of eliminating the so-called sporting theory of justice, discovery practice in many cases simply transfers the battlefield from the courtroom to the pretrial stage. We depose and depose forever, with the end result that the lawsuit is tried twice—and at enormous expense."

<sup>\*</sup> The American Bar Association created a Follow-Up Task Force (chaired by Attorney General Griffin B. Bell) to prepare a report on the Pound Conference. In its Report, which was submitted to the Board of Governors of the American Bar Association in August, 1976, the Task Force made several recommendations designed, *inter alia*, to correct "abuses in the use of discovery." *Report of Pound Conference Follow-Up Task Force*, 74 F.R.D. 159, 191 (1976). See also Erickson, *The Pound Conference Recommendations: A Blueprint for the Justice System in the Twenty-First Century*, 76 F.R.D. 277 (1977); Bell, *The Pound Conference Follow-Up: A Response from the United States Department of Justice*, 76 F.R.D. 320 (1977). On December 2, 1977, the American Bar Association, acting through its Board of Governors, approved the Section of Litigation's *Report of the Special Committee for the Study of Discovery Abuse* (October, 1977). The Special Committee has proposed a variety of changes be made in the Federal Rules of Civil Procedure and is currently continuing to study issues relating to discovery abuse.

that it was rendered under the particular circumstances of this case is, as the Court of Appeals concluded, violative of the First Amendment.

## I.

### The Court of Appeals Correctly Held That First Amendment Protection Should Be Afforded the Press Against Being Compelled by Court Order to Disclose Its Editorial Process Decisions

#### A. The Protection of the Editorial Process

Throughout the course of this Court's rulings in First Amendment cases involving the press,\* the theme has emerged with ever-increasing clarity that no governmental body may interfere with the editorial decision-making process of the press. Protections afforded the press with respect to its decision-making process as to what to print or broadcast have been sweeping. What Justice White has referred to as a "virtually insurmountable barrier" \*\* has been erected protecting the press from prior restraints barring publication of news or editorial articles. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976); *New York Times Co. v. United States*, 403 U.S. 713 (1971); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931).

\* Those cases which distinguish, for certain purposes, between the constitutional rights of publishers and broadcasters—e.g., *FCC v. Pacifica Foundation*, 46 U.S.L.W. 5018 (U.S. July 3, 1978)—do not bear upon this case. Indeed, that CBS and the journalists employed by it who prepared the "60 MINUTES" segment at issue in this case are "press" has not been—and, we believe, may not be—disputed. See, e.g., *Houchins v. KQED, Inc.*, 46 U.S.L.W. 4830 (U.S. June 26, 1978) (access to news); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) (privacy); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971) (libel).

\*\* *Tornillo*, 418 U.S. at 259 (White, J., concurring).

Of virtually equivalent breadth and scope have been the rulings barring governmental entities from compelling the press to print what it chooses not to. The leading case in this area is, of course, the Court's unanimous ruling in *Tornillo*. *Tornillo* involved a Florida statute creating a "right of reply" to press criticism of a candidate for nomination and election. After the Florida Supreme Court ruled the statute was constitutional, this Court reversed, notwithstanding arguments to the effect that: (a) the statute would foster the First Amendment value of diversified expression; (b) media concentration had frustrated the public's right to know about news—including news of the media itself and (c) the statute would help to permit a better informed public to vote in the Florida elections. Despite all these arguments, the fact that the statute was duly adopted by the Florida legislature, and the fact that the "access" movement had received significant scholarly support,\* the Court's reversal was unanimous.

The Court's *Tornillo* opinion emphasized that "[g]overnmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers." (418 U.S. at 256) Two particular vices of the statute at issue in *Tornillo* were relied upon by the Court in its decision. The first was that the statute might well inhibit speech by leading editors to conclude that controversy should be avoided. The second—and more far-reaching—conclusion of the Court related to the nature of the press and the First Amendment functions it performs:

"Even if a newspaper would face no additional costs to comply with a compulsory access law and would not

\* A compilation of the literature is contained in Lange, *The Role of the Access Doctrine in the Regulation of the Mass Media*, 52 N.C. L. Rev. 1, 2 n.5 (1973).

be forced to forego publication of news or opinion by the inclusion of a reply, the Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors. A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of materials to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment.” (418 U.S. at 258)

A similar solicitude for the “exercise of editorial control and judgment” was exhibited by this Court in the *CBS* decision. In that case, which held that neither the Federal Communications Act nor the First Amendment required broadcasters to accept paid editorial advertisements, Chief Justice Burger’s opinion observed that “it would be anomalous for us to hold, in the name of promoting the constitutional guarantees of free expression, that the day-to-day editorial decisions of broadcast licensees are subject to the kind of restraints urged by respondents.” (412 U.S. at 120) The opinion later concluded that:

“For better or worse, editing is what editors are for; and editing is selection and choice of material. That editors—newspaper or broadcast—can and do abuse this power is beyond doubt, but . . . [c]alculated risks of abuse are taken in order to preserve higher values. The presence of these risks is nothing new; the authors of the Bill of Rights accepted the reality that these risks were evils for which there was no acceptable remedy other than a spirit of moderation and a sense of responsibility—and civility—on the part of

those who exercise the guaranteed freedoms of expression.” (*Id.* at 124-25)

Similar themes are reflected in the recent opinion of Chief Justice Burger and two other members of the Court in *Houchins v. KQED, supra*. Emphasis was there placed upon the broad freedom of the press “to communicate information once it is obtained”; of the right “to publish information which has been obtained”; and of the related proposition that “the government cannot restrain communication of whatever information the media acquires—and which they elect to reveal.” (46 U.S.L.W. at 4832)

The very breadth and scope of *Tornillo* and its progeny cause it to remain controversial.\* What is undisputed is that *Tornillo* and its forbears recognize, in Justice White’s phrase, that the “nerve center” of the newsroom must be protected against encroachments by government. (*Tornillo*, 418 U.S. at 261; White, J., concurring) What is disputed on this appeal is whether, as the District Court held, the inviolability of the newsroom from such encroachments has “nothing to do” with the scope of discovery to be permitted in a *Sullivan*-governed libel case.

#### **B. The Risk of Inhibiting the Editorial Process**

Judge Kaufman concluded that inquiries into “how a journalist formulated his judgments on what to print or not to print” would result in a “freeze on the free inter-

\* One scholar has attacked *Tornillo* as being too “absolutist”—and thus inconsistent with “other rules grounded in the First Amendment.” B. Schmidt, *Freedom of the Press vs. Public Access* 13 (1976). It has, as well, been defended as correctly reflecting this Court’s conclusion in a variety of cases “that the degree of First Amendment protection afforded the press depends upon the extent to which the alleged intrusion of press freedom impinges on the editorial decisionmaking process.” Abrams, *In Defense of Tornillo*, Book Review, 86 Yale L.J. 361, 366-67 (1976).

change of ideas within the newsroom." (Pet. 13a) Judge Oakes similarly concluded that "[t]he critical question is whether government [by compelling disclosure of the editorial process] is impermissibly impeding the editorial function of the press; the time at which this intrusion occurs should not—it cannot—matter." (Pet. 35a; footnotes omitted) Both judges were, we believe, correct.

The ultimate inhibitory potential of governmental scrutiny with respect to the editorial process of a writer or journalist need hardly be demonstrated at any length. One may simply advert to the questioning—by counsel and courts alike—that is commonplace in societies which do not have the benefit of a functioning First Amendment. "We have learned," Justice White observed, "and continue to learn, from what we view as the unhappy experiences of other nations where government has been allowed to meddle in the internal editorial affairs of newspapers." *Tornillo*, 418 U.S. at 259 (White, J., concurring).<sup>\*</sup> Such

<sup>\*</sup> *E.g.*:

"Prosecutor: Please don't lecture us on literature. I ask you a simple, concrete question: Why did you portray Ilyich [Lenin] in such an unattractive way?

"Sinyavsky: I said that you cannot make a cult of Lenin. To me Lenin is a human being; there is nothing wrong about saying that.

"Judge: What did you mean in this passage about the deification of Stalin? (*Reads excerpts*)

"Sinyavsky: I am being ironical about making a cult of him. If Stalin had lived a little longer, it might well have come to this.

"Prosecutor: Do these three words reflect your political views and convictions?

"Sinyavsky: I am not a political writer. No writer expresses his political views through his writings. An artistic work does not express political views.

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meddling—and far worse—now occurs routinely throughout the world. Overt censorship of the press is currently

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You wouldn't ask Pushkin or Gogol about their politics. (*Indignation in the courtroom.*) My works reflect my feelings about the world, not politics.

"Prosecutor: I had a different impression. . . ."

And:

"Sinyavsky: . . . I should point out that sometimes he moves away from Lenya and at other times he comes back to him. . . .

"Prosecutor: You are trying to move away from the point!

"Sinyavsky: I'm not making fun of Communism, but of Proferansov.

"Prosecutor: And what about this: 'They have planes, but we have nothing except our naked imagination. . . .' Into whose face are you sticking this bloody hyperbole?

"Sinyavsky: This is a description of a concrete situation—an air raid on the town of Lyubimov. And Lenya Tikhomirov averts the danger by using his extraordinary mental powers.

"Judge: Field interprets that differently. And here you have the scene of a conference in the provincial party committee, and the secretary, Comrade O, says: 'And we don't want any consequences of the cult of personality.' Doesn't this express the author's attitude either? Is this a metaphor, a hyperbole? Is this something said just by Comrade O?

"Sinyavsky: In the person of Comrade O, the secretary of the provincial party committee, there is a hint of certain features of Krushchev, but it was not my intention to criticize him or his ability—I just borrowed certain of Krushchev's mannerisms—the way in which he got worked up during his speeches and used crude language.

"Prosecutor: Let's go back to your essay on *Socialist Realism*. Let's take your political views: What did you have in mind when you wrote: 'To do away with prisons, we built new prisons. . . . We defiled not only our bodies, but our souls'?

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the norm not only throughout Communist nations, but in countries including Uruguay, Chile, Brazil, Lebanon, Haiti, Pakistan, Uganda, Rhodesia, the Philippines, Angola, Colombia, Cameroon, Ghana, El Salvador, Paraguay, Nicaragua, Peru and Bermuda; within the past year journalists have been detained and interrogated in countries (in addition to nations listed above) including Argentina, Spain, South Africa, Laos, Egypt, Guatemala, Zaire, Syria, Singapore, Bangladesh, Indonesia, Taiwan, Tanzania and Turkey.\*

One need not suggest that the abuses that are sadly routine abroad may or will occur in this country; indeed, the fidelity to First Amendment principles reflected in rulings of this Court such as *Tornillo* is one basis for confidence that they will not. Even in this country, however, the potential inhibiting effect of compelling responses to questions such as are at issue here is enormous. Those effects may be most obvious in the context of a congressional investigation in which a journalist is asked precisely the questions put to Mr. Lando—how and why he came to print or broadcast one story and not another.\*\*

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What has this got to do with socialist realism?"  
(Footnotes omitted)

On Trial, *The Soviet State versus "Abram Tertz" and "Nikolai Arzhak"* 94, 105 (M. Hayward ed. 1967).

\* IPI [*The International Press Institute*] Report, January 1978, at 5.

\*\* E.g.:

"The Chairman: [Senator Joseph McCarthy] Have you been making attacks upon J. Edgar Hoover in the editorial columns of your paper?"

"Mr. Wechsler: Sir, the New York Post has, on a couple of occasions, carried editorials critical of the Federal Bureau of Investigation. We do not regard any Government agency as above

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As phrased by Judge Kaufman: "It cannot be gainsaid that were a legislative body to require a journalist to justify his decisions in this matter, such an intrusion would not be condoned." (Pet. 22a-23a)

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criticism. I assume your committee doesn't either. . . .

"The Chairman: Have you ever, in your editorial columns, over the last 2 years, praised the FBI?"

"Mr. Wechsler: Well, sir, I would have to go back and read our editorials for the last 2 years. I did not understand that I was being called down here for a discussion of Post editorial policy. I have tried to say to you what we have said editorially about the FBI.

"The Chairman: Is your answer that you do not recall at this time any praise of the FBI, but you do recall editorializing against the FBI?"

"Mr. Wechsler: The statement that I made was not a criticism of the FBI. . . .

"The Chairman: Have you always been very critical of the heads of the Un-American Activities Committee? You have always thought they were pretty bad men, have you not?"

"Mr. Wechsler: Well, you would have to tell me whom we were talking about. . . .

"The Chairman: . . . Have you consistently criticized the chairman of the House Un-American Activities Committee, whose task it is to expose Communists, or have you ever found one of them that you thought was a pretty good fellow, that you praised, or that you could praise as of today—a chairman?"

"Mr. Wechsler: Well, if you are asking me my position on the activities of the Velde committee, my answer is that I have been editorially critical of those activities, as have many other newspapers.

"The Chairman: . . . Do you think Bill Jenner is doing a good job?"

"Mr. Wechsler: I am not an enthusiast of Senator Jenner's."

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The same potential may also be evident in libel suits when a government official sues for libel and demands unrestricted discovery of those in the press who have incurred his displeasure.\*

The potential for such inhibition is perhaps less evident, but no less real, when a public figure not holding government position sues, both because of the power often held by such an individual and because, in any event, the Court from which such plaintiff seeks aid in obtaining the journalists' testimony and documents is as surely "government" as is an investigating committee of the House of Representatives, the FBI or any investigatory agency. *Landmark Communications, Inc. v. Virginia*, 98 S.Ct. 1535 (1978). See also *Nebraska Press Ass'n v. Stuart*, *supra*; *Craig v. Harney*, 331 U.S. 367, 371 (1947).

To hold that the "probing drill of unrestrained discovery" \*\* may inquire into how and why the press determined what to print, whom to interview and the like thus threatens the press in two discrete, yet related, manners. First—most practically—it would inhibit what Judge Kaufman refers to as "full and candid discussion within the newsroom itself" (Pet. 11a) of "hypotheses and alternatives which are the *sine qua non* of responsible journalism." (Pet. 13a) Second—more theoretically but no less

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*State Department Information Program—Information Centers: Hearings on S.Res. 40 before the Permanent Subcomm. on Investigations of the Senate Committee on Government Operations, 83d Cong., 1st Sess. 260-63 (1953).*

\* *Cf. Democratic National Committee v. McCord*, 356 F.Supp. 1394 (D.D.C. 1973) (quashing subpoena of Committee to Re-Elect the President served upon Washington journalists who had written about Watergate).

\*\* Pet. 30a n.15 (Opinion of Oakes, J., concurring).

realistically—it would threaten the role of the press *vis-a-vis* government itself. We turn briefly to each.

# 1. "Full and Candid Discussion"

That the press must be encouraged and not discouraged from engaging in "full and candid discussion within the newsroom itself" (Pet. 11a) does not seem to us a seriously debatable proposition. The need for legal protection against compelled disclosure of aspects of a societally significant—and constitutionally implicated—decision-making process is hardly unique to the press. Similar protection for similar reasons has long been held required for each branch of the federal government itself.\* A review of these governmental privileges demonstrates that nondisclosure of decision-making processes, including the mental processes of individual decision-makers, has been deemed essential to safeguard the very values threatened in this case: 1) the effective functioning of a constitutionally designated entity which has an overriding impact upon the general public and 2) the constitutionally mandated independence of a designated participant in our democratic system.

A constitutionally rooted executive privilege was firmly established in *United States v. Nixon*, 418 U.S. 683 (1974), in which this Court held that:

\* As Justice Stevens noted in *Houchins v. KQED, Inc.*, *supra*:

"[W]e pointed out [in *United States v. Nixon*] that the Founders themselves followed a policy of confidentiality: 'There is nothing novel about governmental confidentiality. The meetings of the Constitutional Convention in 1787 were conducted in complete privacy. 1 M. Farrand, *The Records of the Federal Convention of 1787*, pp. xi-xxv (1911). Moreover, all records of those meetings were sealed for more than 30 years after the Convention. See 3 Stat. 475, 15th Cong., 1st Sess., Res. 8 (1818). Most of the Framers acknowledged that without secrecy no constitution of the kind that was developed could have been written. C. Warren, *The Making of the Constitution* 134-139 (1937).' " 46 U.S.L.W. at 4838 n.25 (1978) (Stevens, J., dissenting).

"[T]he importance of . . . confidentiality is too plain to require further discussion. Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decision-making process." (418 U.S. at 705; footnote omitted)\*

In its *Nixon* decision, this Court held that there was a "presumptive" constitutionally based executive privilege, notwithstanding the absence of an explicit reference to the privilege within the Constitution itself. The Court concluded that while the Constitution makes no explicit reference to a privilege of confidentiality, "to the extent this interest relates to the effective discharge of a President's powers, it is constitutionally based." (418 U.S. at 711) As stated by the Court:

"The expectation of a President to the confidentiality of his conversations and correspondence, like the claim of confidentiality of judicial deliberations, for example, has all the values to which we accord deference for the privacy of all citizens and, added to those values is the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decision-making. A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These are

\* In light of this language from the *Nixon* decision as to the nature of "human experience," it is difficult to determine what further type of "proof supplied by the parties" (Pet. 52a) Judge Meskill would have deemed required to demonstrate the risks of forced disclosure as to the nature of editorial judgments. See, e.g., *Houchins v. KQED, Inc.*, *supra*, 46 U.S.L.W. at 4839 n.27 (Stevens, J., dissenting).

the considerations justifying a presumptive privilege for Presidential communications. The privilege is fundamental to the operation of government and inextricably rooted in the separation of powers under the Constitution." (*Id.* at 708; footnote omitted)

Of course, in the *Nixon* decision itself this Court held that, in the context of a criminal prosecution and subject to the careful examination by Judge Sirica of each of the documents at issue, the presumptive privilege there at issue was overcome by the need for the evidence in question. Here, however, the case is civil, not criminal; a direct constitutional conflict similar to that posed in *Nixon* is non-existent, since here a First Amendment right is pitted against a common-law cause of action not directly rooted in the Constitution;\* and, in any event, the need for the evidence is (as we later demonstrate)\*\* far less compelling than was the case in the *Nixon* litigation.

Apart from the constitutional protection afforded certain executive branch deliberations and communications, the Court in *United States v. Nixon* pays deference to a long-recognized common law privilege against disclosure of the mental and deliberative processes of executive decision-makers:\*\*\*

\* *Cf. Paul v. Davis*, 424 U.S. 693 (1976).

\*\* See, *infra*, pp. 62-66.

\*\*\* The Supreme Court first announced the general bar against probing "mental processes" of administrative decision-makers in *Morgan v. United States*, 304 U.S. 1 (1938). In reaffirming its position in the fourth *Morgan* case, the Court declared:

"We have explicitly held in this very litigation that 'it was not the function of the court to probe the mental processes of the Secretary.' 304 U.S. 1, 18. Just as a judge cannot be subjected to such a scrutiny, compare *Fayerweather v. Ritch*, 195 U.S. 276, 306-7, so the integrity of the administrative

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"Freedom of communication vital to fulfilment of the aims of wholesome relationships is obtained only by removing the specter of compelled disclosure. . . . [G]overnment . . . needs open but protected channels for the kind of plain talk that is essential to the quality of its functioning.' *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 325 (DC 1966). See *Nixon v. Sirica*, 159 U.S. App. D.C. 58, 71, 487 F.2d 700, 713 (1973); *Kaiser Aluminum & Chem. Corp. v. United States*, 141 Ct.Cl. 38, 157 F.Supp. 939 (1958) (Reed, J.); *The Federalist*, No. 64 (S. Mittell ed. 1938)." (418 U.S. at 708 n.17)

In pursuit of this mandate, courts have generally continued to foreclose judicial investigation "into the methods by which a decision is reached, the matters considered, the contributing influences, or the role played by the work of others." *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 325-26 (D.D.C. 1966), *aff'd per curiam sub nom. V.E.B. Carl Zeiss, Jena v. Clark*, 384 F.2d 979 (D.C. Cir.), *cert. denied*, 389 U.S. 952 (1967). (footnotes omitted)\*

Congress incorporated the policy protecting the deliberative processes of administrators when it exempted from disclosure under the Freedom of Information Act "inter-

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process must be equally respected." *United States v. Morgan*, 313 U.S. 409, 422 (1941).

Also see, *Chicago, B. & Q. Ry. v. Babcock*, 204 U.S. 585, 593 (1907); 2 K.C. Davis, *Administrative Law Treatise* § 11.05 (1958).

\* For recent decisions applying the "mental processes rule," see *Graham v. National Transportation Safety Board*, 530 F.2d 317, 320 (8th Cir. 1976); *National Courier Ass'n v. Board of Governors*, 516 F.2d 1229 (D.C. Cir. 1975); *National Nutritional Foods Ass'n v. Food and Drug Administration*, 491 F.2d 1141 (2d Cir. 1974), *cert. denied*, 419 U.S. 874 (1975); *KFC National Management Corp. v. NLRB*, 497 F.2d 298 (2d Cir. 1974), *cert. denied*, 423 U.S. 1087 (1976).

agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5) (1976). Exemption 5 was itself based upon "the Government's executive privilege," *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975); *Renegotiation Board v. Grumman Aircraft Engineering Corp.*, 421 U.S. 168, 184 (1975); *EPA v. Mink*, 410 U.S. 73, 87-88 (1973). The "purpose of exemption 5 is not simply to encourage frank intra-agency discussion of policy, but also to ensure that the mental processes of decision-makers are not subject to public scrutiny." *Montrose Chemical Corp. v. Train*, 491 F.2d 63, 70 (D.C. Cir. 1974).\*

Analogous protection has been afforded under the Speech or Debate Clause of the Constitution to protect members of Congress and their staffs from searching judicial scrutiny. The "central role of the Speech or Debate Clause—[is] to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary. . . ." *Gravel v. United States*, 408 U.S. 606, 617 (1972). In *Gravel*, this Court underscored a related policy consideration by citing Mr. Justice Harlan who observed in *Barr v. Matteo*:\*\*

"[T]he 'privilege is not a badge or emolument of exalted office, but an expression of a policy designed to aid

\* See *NLRB v. Sears, Roebuck & Co.*, *supra*, 421 U.S. at 150-51 ("the 'frank discussion of legal or policy matters' in writing might be inhibited if the discussion were made public; and . . . the 'decisions' and 'policies formulated' would be the poorer as a result.") (quoting S.Rep. No. 813, 89th Cong., 1st Sess. 9 (1965).)

\*\* *Barr* extended executive immunization against libel actions to a non-cabinet ranking officer. Similarly, *Gravel* extended protection of the Speech or Debate Clause to Congressional aides in order "to implement its fundamental purpose of freeing the legislator from executive and judicial oversight that realistically threatens to control his conduct as a legislator." *Gravel v. United States*, *supra*, 408 U.S. at 618.

in the effective functioning of government.'” *Gravel v. United States*, *supra*, 408 U.S. at 617, citing *Barr v. Matteo*, 360 U.S. 564, 572-73 (1959).

The scope of the Clause is also defined in functional terms. Insofar as the Clause is construed to reach beyond actual speech or debate, the matters privileged “must be an integral part of the deliberative and communicative processes.” (*Id.* at 625) The privilege covers indirect as well as direct impairment of such deliberations. (*Id.*)

Finally, a similar testimonial privilege has been afforded to members of the judiciary. In *United States v. Morgan*, *supra*, 313 U.S. at 42, the Court declared that “an examination [into the mental processes] of a judge would be destructive of judicial responsibility.” *Cf. Stump v. Sparkman*, 98 S.Ct. 1099 (1978); *see also United States v. Dowdy*, 440 F.Supp. 894, 896 (W.D. Va. 1977); *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, *supra*, 40 F.R.D. at 326.

In that respect, as members of this Court have had occasion to note with approval, the Court’s “own conferences [and] the meetings of other official bodies gathered in executive session” are routinely closed to the press and public. *Branzburg v. Hayes*, 408 U.S. 665, 684 (1972); *Pell v. Procunier*, 417 U.S. 817, 834 (1974); *City of Madison v. Wisconsin Employment Relations Commission*, 429 U.S. 167, 178 (1976) (Brennan, J., concurring); *Houchins v. KQED, Inc.*, *supra*, 46 U.S.L.W. at 4838-39 (Stevens, J., dissenting).\*

\* *See generally*, Rehnquist, *Sunshine in the Third Branch*, 16 Washburn L. Rev. 559, 561 (1977). Justice Rehnquist concludes that secrecy of the deliberative processes of the Court

“permits a remarkably candid exchange of views among the members of the Conference. This candor undoubtedly advances the purpose of the Conference in resolving the cases before it.

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The press is, we submit, hardly less vulnerable than government itself to the dangers of compelled disclosure of its deliberative and mental processes.\* As Judge Kaufman noted, “the lifeblood of the editorial process is human judgment. The journalist must constantly probe and investigate; he must formulate his views and, at every step, question his conclusions, tentative or otherwise.” (Pet. 21a)

To all this, both Judge Meskill and the Petitioner before this Court (Pet. Br. 47-48) assert that the risk of inhibition of the press urged herein—and found present by the Court of Appeals—has not been proved with sufficient empirical evidence. As noted above, any such requirement is inconsistent with both this Court’s own judgment as to the teachings of “human experience” in the *Nixon* case and with the fact that similar protection has been held by the courts to be required for each branch of government to protect its own institutional viability. It is, as well, at odds with the approach taken generally by this Court in First Amendment cases.

This Court has been acutely sensitive to any risk that governmental action itself might deter or inhibit others from the full exercise of their constitutional rights. *See, e.g., Landmark Communications, Inc. v. Virginia*, *supra*, 98 S.Ct. at 1541 (criminal sanctions for the publication by

(Footnote continued from previous page)

No one feels at all inhibited by the possibility that any of his remarks will be quoted outside of the Conference Room, or that any of his half-formed or ill-conceived ideas, which all of us have at times, will be later held up to public ridicule.” (*Id.* at 565)

\* Indeed, in *Sullivan* itself, this Court concluded that “[i]t would give public servants an unqualified preference over the public they serve, if critics of official conduct did not have a fair equivalent of the immunity granted to the officials themselves.” (376 U.S. at 282-83)

a newspaper of truthful statements concerning a public official in connection with his public duties); *Elrod v. Burns*, 427 U.S. 347, 355-73 (1976) (practice of patronage dismissals by public officials); *Buckley v. Valeo*, 424 U.S. 1, 12-59 (1976) (provisions in Federal Election Campaign Act limiting various campaign expenditures by or for candidates); *Kusper v. Pontikes*, 414 U.S. 51, 56-61 (1973) (prohibition against voting at primary if voter has voted at primary of another political party within specified period of time); *Healy v. James*, 408 U.S. 169, 181-84 (1972) (denial, without justification, of request for official recognition of political campus organization by state college); *Lamont v. Postmaster General*, 381 U.S. 301, 305-07 (1965) (statutory postal requirement obligating addressee to request in writing that "communist political propaganda" be delivered); *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539, 543-50 (1963) (requirement that organization supply membership records); *NAACP v. Button*, 371 U.S. 415, 428-44 (1963) (inclusion of civil rights organization in Virginia statute prohibiting solicitation of legal business by certain specified parties); *Talley v. California*, 362 U.S. 60, 64-65 (1960) (requirement that names and addresses of sponsors be printed on handbills); *Bates v. City of Little Rock*, 361 U.S. 516, 523-27 (1960) (compulsory disclosure of membership lists); *Smith v. California*, 361 U.S. 147, 150-55 (1959) (ordinance imposing strict liability on bookseller of obscene book even if bookseller had no knowledge as to contents of book). See also *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293, 296-97 (1961); *Shelton v. Tucker*, 364 U.S. 479, 484-90 (1960); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-66 (1958).

The language in many of these cases is suggestive of the fashion in which they were approached by this Court: in *Buckley*, for example, the Court concluded that exacting

scrutiny must be provided by the Court to avoid a chilling effect "even if any deterrent effect on the exercise of First Amendment rights arises, not through direct government action, but indirectly as an unintended but inevitable result of the government's conduct . . . ." (424 U.S. at 65) In *Talley*, the required disclosure of names and addresses of those who wrote and/or sponsored the distribution of handbills was held unconstitutional because it "would tend to restrict freedom to distribute information and thereby freedom of expression." \* (362 U.S. at 64) In *Lamont* the Court, in holding unconstitutional a postal requirement that those who wish to receive "communist political propaganda" had to request it explicitly of the Post Office, expressed concern about the fact that "any addressee is likely to feel some inhibition" at doing so: such a requirement, the Court concluded, was "at war with the 'uninhibited, robust, and wide-open' debate and discussion that are contemplated by the First Amendment." (381

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\* Many cases decided since *Talley* have held unconstitutional requirements of compulsory disclosure of the authors or distributors of various publications. See, e.g., *Opinion of the Justices*, 306 A.2d 18 (Me. 1973) (requirement that author of newspaper editorials be disclosed held unconstitutional); *In re Opinion of the Justices*, 324 A.2d 211 (Del. 1974) (requirement that author of newspaper editorials be signed held unconstitutional); *Wulp v. Corcoran*, 454 F.2d 826 (1st Cir. 1972) (ordinance requiring persons wishing to sell printed materials on street to obtain a permit and a badge held unconstitutional); *Bursey v. United States*, 466 F.2d 1059, 1088 (9th Cir. 1972) (grand jury investigating assassination threat against President held not entitled, in light of First Amendment, to require answers to questions as to "all persons who worked on the paper and the pamphlets, to describe each of their jobs, [and] to give the details of financing the newspaper . . ."); *Printing Industries v. Hill*, 382 F.Supp. 801, 809 (S.D. Texas 1974), vacated on grounds of amendment to legislation, 422 U.S. 937 (1975) (election statute requiring identification of "printer or publisher" of political advertising held unconstitutional since printer "may decline to print matter submitted to him by dissident or unpopular groups for fear of official or unofficial reprisals. . . .").

U.S. at 307) And in *Smith* the Court, in holding unconstitutional a criminal ordinance which, as construed by the state courts, rendered a bookseller strictly liable for the mere possession of obscene materials even if the bookseller had no knowledge as to the contents of the book, observed that such an ordinance would cause a bookseller to "tend to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature." (361 U.S. at 153) As the Court concluded in *Smith*: "It is plain to us that the ordinance in question, though aimed at obscene matter, has such a tendency to inhibit constitutionally protected expression that it cannot stand under the Constitution." (361 U.S. at 155)

In a variety of other areas as well, courts, in the interest of avoiding even the possibility of inhibiting protected speech, have taken the strongest steps to avoid such inhibition. Statutes have thus been held unconstitutionally overbroad on the basis of the

"judgment of this Court that the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted and perceived grievances left to fester because of the possible inhibitory effects of overly broad statutes." *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973); see also *Gooding v. Wilson*, 405 U.S. 518, 521 (1972).

Similarly, vague statutes which even touch upon First Amendment freedoms have been held unconstitutional on the ground that such "freedoms are delicate and vulnerable, as well as supremely precious in our society," *NAACP v. Button*, *supra*, 371 U.S. at 433, and that "[u]ncertain mean-

ings inevitably lead citizens to "steer far wider of the unlawful zone" . . . than if the boundaries of the forbidden areas were clearly marked." *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972).

All the First Amendment cases previously discussed in this section have in common the application of a legal test which, far from requiring certain empirical proof that particular laws or compelled responses to inquiries will inhibit the exercise of First Amendment rights, is sensitive to even the possibility of any such inhibition. Hence, legal standards which would be unthinkable in other areas of law have been routinely applied: laws that "would tend to restrict freedom" are stricken (*Talley*); governmental practices that would "likely" make individuals "feel some inhibition" are stricken (*Lamont*); libel law itself is constitutionalized so as to avoid "dampen[ing] the vigor" of debate (*Sullivan*); and statutes are stricken because speech "may be muted" (*Broadrick*) and because First Amendment rights are so "delicate and vulnerable" (*Button*).

In this context, it is all the more evident that the Court of Appeals correctly concluded that there was need for First Amendment protection and that a view of the Federal Rules which permitted discovery of the editorial process of the press in *Sullivan* libel cases because discovery was permitted as to "almost anything" (Pet. 63a) was constitutionally unacceptable.

## 2. The Press vis-a-vis Government

It has often been said to be the very function of the press to serve as a "mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees," *Estes v. Texas*, 381 U.S. 532, 539 (1965); to function as a "powerful antidote to any abuses of power by governmental officials," *Mills v.*

*Alabama*, 384 U.S. 214, 219 (1966); and to guard "against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism." *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966). As phrased with customary prescience by de Tocqueville, the press:

"makes political life circulate in every corner of that vast land. Its eyes are never shut, and it lays bare the secret shifts of politics forcing public figures in turn to appear before the tribunal of opinion."\*

One question this case poses is thus whether the same public officials and public figures against whom the press—at its best—is to guard are to be permitted to compel answers to questions at the heart of the press's decision-making process regarding what to print about them.

The mutual independence of the press and the government has long been recognized by this Court. Recently the Court has re-emphasized the lines of autonomy, permitting the press to print what it learns about government but denying the press any government-conferred privilege of special investigative access to the government itself. *Landmark Communications, Inc. v. Virginia*, *supra*; *Houchins v. KQED, Inc.*, *supra*. One justification for this denial, Chief Justice Burger noted, is the mutuality of the press-government autonomy mandated by the Constitution. Just as the press has no claim on the government

\* A. de Tocqueville, *Democracy in America* 171 (J.P. Mayer and M. Lerner eds. 1966). De Tocqueville was not uncritical of the press. As he observed:

"I admit that I do not feel toward freedom of the press the complete and instantaneous love which one affords to things by their nature supremely good. I love it more from considering the evils it prevents than on account of the good it does." (*Id.* at 166)

for special access to data, so "[n]o comparable pressures are available to anyone to compel publication by the media of what they might prefer not to make known." (*Houchins v. KQED*, *supra*, 46 U.S.L.W. at 4833)

In recognizing in *KQED* the mutual autonomy of press and government, Chief Justice Burger quoted with approval from Justice Stewart's seminal speech at the Yale Law School in which it was observed that as between press and government, the Constitution "establishes the contest, not its resolution."\*

If—as we agree—the Constitution established a contest between press and government in which neither "contestant" was to handicap the other, it was not because prior to the Constitution antagonism between press and government was unknown. Rather, the Constitution established a contest in the same sense that the Marquis of Queensberry "established" boxing: the natural antagonism was always there; only the rules were lacking.

Before the Constitution, the press had been subject to a variety of crushing repressions which operated by regulation, both editorial and economic. The Constitution sought to even the match between press and government by forbidding the use of government's coercive power on the press's communicative functions. As Justice Stewart observed:

"[f]or centuries before our Revolution, the press in England had been licensed, censored, and bedeviled by prosecutions for seditious libel. The British Crown knew that a free press was not just a neutral vehicle for the balanced discussion of diverse ideas. Instead, the free press meant organized, expert scrutiny of

\* Stewart, "*Or of the Press*," 26 *Hastings L.J.* 631, 636 (1975), quoted at 46 U.S.L.W. at 4833.

government. . . . This formidable check on official power was what the British Crown had feared—and what the American Founders decided to risk.” (26 Hastings L.J. at 634)

It is noteworthy that the repressive measures familiar in pre-Revolutionary England and America were far from limited to direct censorship and licensing of presses. From the introduction of the printing press in England in 1476, the English government had an astute understanding that the press functioned as an industrial and economic institution—as a business—and fashioned its regulation accordingly.\* Across the Atlantic, the American colonials had occasion to learn that the press’s ability to function could be grievously impaired by regulation not on its face implicating the editorial process—as for example, the infamous Stamp Act itself. In particular, aggressive government inquiry into the prepublication process was a familiar measure of repression.\*\*

\* The legal history of the press in 16th and 17th century England was surveyed in W. Holdsworth, *A History of English Law* (1924). Holdsworth demonstrates that from the inception of printing in England, the crown recognized the need of the government to maintain strict control “over the printing, publication and importation of books,” in the interests of the state’s “peace and security.” Jurisdiction over state control of printing was vested in the Star Chamber. (Vol. 5 at 208 (3d ed. 1945)) Control was also effected at first through the Stationers Company, which was granted inherent power by the Tudors to supervise and charge fees to individual printers in exchange for helping the government suppress objectionable works. (Vol. 6 at 363-64 (2d ed. 1937)) The Stationers themselves were originally the book-purveyors, who bought the printers’ wares, “the capitalists upon whom the printers depended.” (*Id.* at 362-63) Patent monopolies were issued for the exclusive right of individual printers to publish on particular subjects. Thus the earliest regulation of the press was economic.

\*\* Among the broad functions of the press-regulating Stationers Company in England were extraordinary powers of search and

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Although from the earliest date printing presses have been used to issue publications on every subject, it was particularly news publications and journalistic institutions which were the occasion for repressive measures against the press. In Frederick Siebert’s classic treatment of the subject,\* the English history is recounted. Siebert’s analysis of materials in the British Museum demonstrates that English newspapers in the pre-Revolutionary period num-

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seizure in quest of unlicensed presses, and the responsibility for “discovering the authors or printers of any obnoxious works.” Holdsworth, *supra*, Vol. 6 at 363-64. The very earliest English news publications met with hostile official inquiry into the prepublication process, but printers like Nicholas Bourne, Michael Sparke and James Bowler resisted by refusing to reveal the authors or purchasers of works they printed. F. Siebert, *Freedom of the Press in England 1476-1776* 155 (1952). The same tactic of forcing publishers to answer questions about the prepublication process was used in colonial America. See, for instance, the New York trial in 1770 of Alexander McDougall, who was identified under threat of imprisonment as the author of an allegedly seditious handbill by the handbill’s printer, whose name was in turn betrayed after the Governor of New York offered a £150 reward for the information. L. Levy, *Freedom of the Press from Zenger to Jefferson* xlii-xliii (1966).

\* F. Siebert, *Freedom of the Press in England 1476-1776*, *supra*, has been called “[e]asily the best book on the subject.” L. Levy, *Freedom of the Press from Zenger to Jefferson*, *supra*, at lxxxiii. Siebert notes the wide proliferation of news publications in England and the crown’s immediate and continuing reaction of pervasive control. The appearance of the first newssheets in 1621 resulted in “all the devices of the crown for the control of printing” being quickly set in motion. (Siebert, *supra*, at 151) Ensuing ordinances were directed particularly at journalistic reporting. See *id.* at 207. In 1680 public feeling was so agitated by newsbooks that King Charles II asked the kingdom’s judges how far he might go in regulating them. The judges’ reply, recorded in the *London Gazette*, No. 1509, May 3-6, 1680, was:

“That his Majesty may by law prohibit the Printing and Publishing of all News-Books and Pamphlets of News, whatsoever, not licensed by His Majesty’s Authority, as manifestly tending to the Breach of Peace, and Disturbance of the Kingdom.” (*Id.* at 298)

bered not in the dozens but in the hundreds. The highest incidence occurred in 1645, during the Puritan Revolution, when there were 722 newspapers published. (Siebert, *supra*, at 203)

Newspaper production in America was not so advanced as in England, but yet was sufficiently developed by the time of the Revolution to refute any suggestion that the pre-Revolutionary journalistic press was inconsequential. An exhaustively researched study by Arthur M. Schlesinger, Sr. documents the vitality of the pre-Revolutionary press and its crucial role in the war.\* Schlesinger surveys the array of forms of communication in pre-Revolutionary America—songs, poems, pamphlets, religious sermons. He concludes:

“Of these many ways of kneading men’s minds none, however, equaled the newspapers. Published from New Hampshire to Georgia, increasing in number with the rise of American opposition, issued with clocklike regularity and reaching every segment of society, they influenced events both by reporting and abetting local patriot transactions and by broadcasting kindred proceedings in other places. The press, that is to say, instigated, catalyzed and synthesized the many other forms of propaganda and action. It trumpeted the doings of Whig committees, publicized rallies and mobbings, promoted partisan fast days and anniversaries, blazoned patriotic speeches and toasts, popularized anti-British slogans, gave wide currency to ballads and broadsides, furthered the persecution of

\* *Prelude to Independence—The Newspaper War on Britain 1764-1776* (1958). Schlesinger’s book has been described by historian Leonard Levy as “[t]he best account of the press, its propaganda activities, and its exercise of freedom, by one of the nation’s leading historians.” L. Levy, *Freedom of the Press from Zenger to Jefferson*, *supra*, at lxxxiii.

Tories, reprinted London news of the government’s intentions concerning America and, in general, created an atmosphere of distrust and enmity that made reconciliation increasingly difficult. Besides, the newspapers dispensed a greater volume of political and constitutional argument than all the other media combined.” (*Id.* at 45-46)

Schlesinger’s conclusions and other data\* refute the conclusion that the 18th century was unfamiliar with the concept of an institutional, journalistically functioning press—a press already in “contest” with government.\*\*

Thus, the framers of the Constitution knew what the press was, knew how crucial a role it could play in shaping government, and knew the multitude of ways in which the journalistic function could be undermined. Knowing all this, they chose to emphasize the special significance to them of liberty of the press, and to accord that liberty a central role in the litany of freedoms.

As initially introduced by James Madison in June, 1789, what became the First Amendment stated:

“The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable.” 1 *Annals of Congress* 434 (1789).

\* See Siebert, *supra*. For further account of the vitality of pre-Revolutionary journalism in the American colonies, see C. Duniway, *The Development of Freedom of the Press in Massachusetts* (1966), *passim*.

\*\* See, for the contrary—and, we believe, unsupported—conclusion that the colonial press was “neither well-circulated nor widely read,” Lange, *The Speech and Press Clauses*, 23 U.C.L.A. L. Rev. 77, 90 n.80 (1975).

Madison simultaneously proposed an amendment that "No state shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases." (*Id.* at 435) The Committee of the House altered this second proposed amendment by adding freedom of speech. The amendment as adopted by the House was "no State shall infringe the equal rights of conscience, nor the freedom of speech, or of the press, nor of the right of trial by jury in criminal cases." (*Id.* at 755) Madison was said to consider this "the most valuable amendment in the whole list." (*Id.*) The Senate would not, however, accept its restrictions on state powers. The ensuing compromise produced the language presently embodied in the First Amendment.\*

Madison, stating his opposition to the Alien & Sedition Laws, later emphasized the central role the inclusion of the press clause of the First Amendment had played in leading to ratification of the Constitution:

"When the Constitution was under the discussions which preceded its ratification, it is well known, that great apprehensions were expressed by many, lest the omission of some positive exception from the powers delegated, of certain rights, and of the freedom of the press particularly, might expose them to the danger of being drawn by construction within some of the powers vested in Congress; more especially of the power to make all laws necessary and proper for carrying their other powers into execution. In reply to this objection, it was invariably urged to be a fundamental and characteristic principle of the Constitution, that all powers not given by it, were re-

\* This history, and further details and background to the passage of the First Amendment, are recounted in E.G. Hudon, *Freedom of Speech and Press in America* (1963). See especially Chap. 1, "Adoption of the Constitution and the First Amendment."

served; that no powers were given beyond those enumerated in the Constitution, and such as were fairly incident to them; that the power over the rights in question, and *particularly over the press*, was neither among the enumerated powers, nor incident to any of them; and consequently that an exercise of any such power, would be a manifest usurpation. It is painful to remark, how much the arguments now employed in behalf of the sedition-act, are at variance with the reasoning which then justified the Constitution, and invited its ratification.

"From this posture of the subject, resulted the interesting question in so many of the conventions, whether the doubts and dangers ascribed to the Constitution, should be removed by any amendments previous to the ratification, or be postponed, in confidence that as far as they might be proper, they would be introduced in the form provided by the Constitution. The latter course was adopted; and in most of the states, the ratifications were followed by propositions and instructions for rendering the Constitution more explicit, and more safe to the rights not meant to be delegated by it. Among those rights, *the freedom of the press, in most instances, is particularly and emphatically mentioned.*" *Report on the [Virginia] Resolutions [of 1798], reprinted in VI The Writings of James Madison* 390-91 (Gaillard Hunt ed. 1906) (Emphasis added).

Allowing for the hyperbole sometimes involved in the heated discussion of current affairs, there is no basis for quarreling with Madison's recollections.\* Virginia, for example, had ratified the Constitution with the express caveat that

\* In *Sullivan* itself, the Court observed that "the great controversy over the Sedition Act of 1798, 1 State. 596, . . . first crys- (Footnote continued on next page)

"no right of any denomination can be cancelled abridged restrained or modified by the Congress by the Senate or House of Representatives acting in any Capacity by the President or any Department or Officer of the United States except in those instances in which power is given by the Constitution for those purposes: & that among other essential rights the liberty of Conscience and of the Press cannot be cancelled abridged restrained or modified by any authority of the United States." *Virginia's Resolution of Ratification, reprinted in We the States: An Anthology of Historic Documents and Commentaries Thereon, Expounding the State and Federal Relationship* 71 (1964).

Massachusetts had adopted a constitution which protected, by its terms, only "the liberty of the press," without even referring to freedom of speech.\* And Pennsylvania had so emphasized the freedom of the press in its state constitutions as to dwarf the accompanying reference to freedom of speech.\*\* There were, as well, extended discussions during the ratification process about the functions performed by the press and the need for press freedom so that those functions might be performed.\*\*\*

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talized in a national awareness of the central meaning of the First Amendment." (376 U.S. at 273)

\* "The liberty of the press is essential to the security of freedom in a State; it ought not, therefore, to be restrained in this Commonwealth." The history of the ratification of the Massachusetts Constitution is set forth in C. Duniway, *The Development of Freedom of the Press in Massachusetts*, *supra*.

\*\* Pennsylvania's first constitution provided: "That the people have a right to freedom of speech, and of writing, and publishing their sentiments; therefore the freedom of the press ought not to be restrained." 5 *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws* 3083 (F. Thorpe ed. 1909).

\*\*\* *Id.*, e.g., Richard Henry Lee, "Letter XVI, January 20, 1788," reprinted in *An Additional Number of Letters From the Federal* (Footnote continued on next page)

Whatever other conclusions may be drawn from the history of the adoption of the press clause of the First Amendment,\* two carry special import for this case: the first is that the background to the drafting of the First Amendment was that of suppression of newspapers in England and significant dissemination of newspapers in the colonies; the second is that the press clause of the First Amendment was no afterthought, no mere appendage of the speech clause, but a deeply felt response to the deprivations of press liberty that the colonists had witnessed and to which they had been subject. In short, "[t]hat the First Amendment speaks separably of freedom of speech and freedom of the press is no constitutional accident, but an acknowledgment of the critical role played by the press in American society." *Houchins v. KQED, Inc.*, *supra*, 46 U.S.L.W. at 4834 (Stewart, J., concurring).

To say this is not to denigrate the speech clause and all that it protects; it is not to elevate the press clause to supremacy above all other constitutional provisions; and it is not to say that the *only* "press" that is entitled to protection under the press clause is institutional in nature—

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*Farmer to the Republican* 152-53 (1962) ["A free press is the channel of communication as to mercantile and public affairs; by means of it the people in large countries ascertain each other's sentiments: are enabled to unite, and become formidable to those rulers who adopt improper measures. Newspapers may sometimes be the vehicles of abuse, and of many things not true; but these are but small inconveniences, in my mind, among many advantages. A celebrated writer, I have several times quoted, speaking in high terms of the English liberties, says, 'lastly the key stone was put to the arch, by the final establishment of the freedom of the press.'"]

\* We do not suggest that all First Amendment issues may be resolved by reference to 18th Century history, any more than all 14th Amendment issues may be resolved by reference to the history of the 19th Century. *Cf. Brown v. Board of Education*, 347 U.S. 483, 489-93 (1954); *Regents of the Univ. of California v. Bakke*, 46 U.S.L.W. 4896, 4902-04 (U.S. June 28, 1978) (Opinion of Powell, J.).

the lonely pamphleteer, as well, is protected. *Lovell v. City of Griffin*, 303 U.S. 444 (1938).

Nor is it to deny that often the framers used the terms "freedom of speech" and "freedom of the press" interchangeably\*—just as we often do. Yet the flexibility of daily usage, which has sometimes resulted in "freedom of speech" and "freedom of the press" being used interchangeably—or "freedom of expression" being used to convey both or either—does not mean that when the terms were chosen for use in the Constitution itself they were not meant to convey something precise and discrete.

What the history suggests is that, as Judge Oakes observed in his opinion, there are "*communicative functions* properly protected under the Free Press clause" (Pet. 43a n.34; emphasis added); they are the functions historically performed by newspapers (and now, as well, by broadcasters). The functions served by the press have been set forth by members of this Court on a variety of occasions;\*\* one,—a most central one—is that of participating in a "contest" established by the Constitution itself.\*\*\*

It has come to be determined that one of the rules of that contest is that the press may not force the government

\* L. Levy, *Legacy of Suppression: Freedom of Speech and Press in Early American History* 174 (1960); cf. *First National Bank v. Bellotti*, 98 S.Ct. 1407, 1426 (1978) (Burger, C.J., concurring).

\*\* E.g., *Houchins v. KQED, Inc.*, *supra*, 46 U.S.L.W. at 4837-39 (Stevens, J., dissenting); *Saxbe v. Washington Post Co.*, 417 U.S. 843, 856-64 (1974) (Powell, J., dissenting); *Near v. Minnesota*, *supra*; *Mills v. Alabama*, *supra*; *New York Times Co. v. United States*, *supra*, 403 U.S. at 717 (Black, J., concurring).

\*\*\* As stated by Chief Justice Burger in his opinion in *Houchins v. KQED, Inc.*, *supra*: "[w]e must not confuse the role of the media with that of government; each has special, crucial functions each complementing—and sometimes conflicting with—the other." (46 U.S.L.W. at 4832)

to furnish information (except to the extent that any citizen may so force the government); beyond that, gathering information is a *press* function to be left to the press itself. But surely another rule must be that the government may not use a peculiarly *governmental* function—the taxing power, as in *Grosjean v. American Press Co.*, 297 U.S. 233 (1936), the unlimited discovery probe, as here—to invade the editorial functions of the press. It is that which is at stake in this appeal.

## II.

### The Decision of the Court of Appeals Is Consistent With That in *New York Times Co. v. Sullivan*

It is important to recognize what the decision below did and did not do. It did not alter or in any way purport to modify the substantive rules of libel established in *Sullivan*. Rather the Second Circuit's ruling is one of a series of decisions, albeit the first in this context, made by district and circuit courts\* to implement the new rules of liability announced by this Court in *Sullivan* and clarified over the last decade in its decisions.\*\*

\* See, e.g., *Cervantes v. Time, Inc.*, 464 F.2d 986 (8th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973) (discovery—confidential source); *Washington Post Co. v. Keogh*, 365 F.2d 965, 967-68 (D.C.Cir. 1966), *cert. denied*, 385 U.S. 1011 (1967) (summary judgment); *Buckley v. New York Post Corp.*, 373 F.2d 175, 183-84 (2d Cir. 1967) (*forum non conveniens*); *Guitar v. Westinghouse Electric Corp.*, 396 F.Supp. 1042 (S.D.N.Y. 1975) (summary judgment); cf. *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Board*, *supra* (pleading requirements where First Amendment rights involved). Petitioner is simply wrong when he asserts that "other than the rules of independent appellate review and the heavier burden of proof enunciated in *Sullivan* itself, it would be inaccurate to conclude that courts have treated the *Sullivan* principles as calling for alteration of rules of procedure." (Pet. Br. 31n\*; citation omitted)

\*\* *Time, Inc. v. Firestone*, 424 U.S. 448 (1976); *Gertz v. Robert Welch, Inc.*, *supra*; *Rosenbloom v. Metromedia, Inc.*, *supra*; *St.* (Footnote continued on next page)

The specific rule of liability announced in *Sullivan* was adopted to protect "robust" debate and to avoid "dampening" the vigor "of public debate." (376 U.S. at 270, 279) But protection against ultimate liability alone cannot avoid the potentially inhibiting effect which various aspects of litigation can themselves create. In *Garrison v. Louisiana*, 379 U.S. 64 (1964), the Court noted that mere exposure in court of a speaker's motives erodes First Amendment functions. "Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred." (*Id.* at 73) As we noted earlier, this Court has recognized the potential burden which pretrial discovery can pose even in a context unaffected with any First Amendment interest. *Blue Chip Stamps v. Manor Drug Stores*, *supra*, 421 U.S. at 741. That burden is exacerbated in a First Amendment context. *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executives Board*, *supra*, 542 F.2d at 1082-83.

In the libel field itself, the Court of Appeals for the District of Columbia Circuit has observed:

"One of the purposes of the [*Sullivan*] principle, in addition to protecting persons from being cast in damages in libel suits filed by public officials, is to prevent persons from being discouraged in the full and free exercise of their First Amendment rights with respect to the conduct of their government." *Washington Post Co. v. Keogh*, *supra*, 365 F.2d at 968.

In *Keogh*, summary judgment was held to be a particularly appropriate manner of dealing with groundless libel suits since the mere pendency of litigation by a public official

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*Amant v. Thompson*, 390 U.S. 727 (1968); *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967).

(or public figure) may have a chilling effect.\* In the present case the Court of Appeals for the Second Circuit has recognized that intrusive pre-trial discovery into the editorial process may well have a similar chilling impact, quite without regard to the merits of the underlying claim. Judge Meskill's response that the "whole idea" of libel suits is to chill "the exercise of editorial judgment" (Pet. 49a) simply misses the point; libel suits, like statutes which are impermissibly overbroad, may chill *both* protected and unprotected speech if questioning such as that at issue in this case is permitted.

The same recognition that the significance of First Amendment considerations in libel cases extends beyond the standards for liability has been recognized in a discovery context. In *Cervantes v. Time, Inc.*, *supra*, the Court's concern for the damage to First Amendment protected rights which would result from application of ordinary discovery rules to a *Sullivan* libel case led it to affirm the denial of the discovery of a confidential source. In that case, St. Louis Mayor Cervantes, in the course of discovery, sought disclosure of a confidential source of information; Time, Inc. cross-moved for summary judgment, which was granted. The Court of Appeals affirmed the ruling granting summary judgment, notwithstanding its conclusion (with which we differ) that "the First Amendment does not grant to reporters a testimonial privilege to withhold news sources." (464 F.2d at 992; footnote omitted) It did so on the ground that:

\* See also *Guitar v. Westinghouse Electric Corp.*, *supra*, 396 F.Supp. at 1053 ("Summary judgment is *the* rule, and not the exception, in defamation cases" (emphasis in original); *Grant v. Esquire, Inc.*, 367 F.Supp. 876, 881 (S.D.N.Y. 1973) (public figure plaintiff must "make a far more persuasive showing than required of an ordinary litigant in order to defeat a defense motion for summary judgment.")

"[t]o routinely grant motions seeking compulsory disclosure of anonymous news sources without first inquiring into the substance of a libel allegation would utterly emasculate the fundamental principles that underlay the line of cases articulating the constitutional restrictions to be engrafted upon the enforcement of State libel laws." (*Id.* at 993; footnote omitted)\*

And it observed that:

"Where there is a concrete demonstration that the identity of defense news sources will lead to persuasive evidence on the issue of malice, a District Court should not reach the merits of a defense motion for summary judgment until and unless the plaintiff is first given a meaningful opportunity to cross-examine those sources, whether they be anonymous or

\* The approach taken by the *Cervantes* court is analagous to the long-standing practice of the Federal Communications Commission not even to investigate charges of "slanting" by broadcasters, absent extrinsic evidence of a decision by a broadcast licensee to "slant" the news. As phrased by the FCC in one of its leading rulings:

"We stress that in this area of staging or distorting the news, we believe that the critical factor making Commission inquiry or investigation appropriate is the existence or material indication, in the form of extrinsic evidence, that a licensee has staged news events. Otherwise, the matter would again come down to a judgment as to what was presented, as against what should have been presented—a judgmental area for broadcast journalism which this Commission must eschew. For the Commission to investigate mere allegations, in the absence of a material indication of extrinsic evidence of staging or distortion, would clearly constitute a venture into a quagmire inappropriate for this Government agency."

*Network Coverage of the Democratic National Convention*, 16 F.C.C.2d 650, 657-58 (1969); see also *The Selling of the Pentagon*, 30 F.C.C.2d 150 (1971); *Hunger In America*, 20 F.C.C.2d 143 (1969).

known. For only then can it be said that no genuine issue remains to be tried. Thus, if, in the course of pre-trial discovery, an allegedly libeled plaintiff uncovers substantial evidence tending to show that the defendant's published assertions are so inherently improbable that there are strong reasons to doubt the veracity of the defense informant or the accuracy of his reports, the reasons favoring compulsory disclosure in advance of a ruling on the summary judgment motion should become more compelling. Similarly, where pre-trial discovery produces some factor which would support the conclusion that the defendant in fact entertained serious doubt as to the truth of the matters published, identification and examination of defense news sources seemingly would be in order, and traditional summary judgment doctrine would command pursuit of further discovery prior to adjudication of a summary judgment motion." (*Id.* at 994)

Here, of course, entirely aside from the District Court's failure to recognize the risks of inhibition of First Amendment rights which inexorably flow from its decision, the Court neither inquired "into the substance" of Petitioner's libel allegations, nor required any "concrete demonstration" of need for the material.

Prior to its ruling in this case, the Court of Appeals for the Second Circuit had also accommodated First Amendment interests in the context of an ongoing civil litigation. In its ruling in *Baker v. F&F Investment*, 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973), the Court rejected an argument which would have required disclosure by journalists of their confidential sources in all federal question cases or, at least, all federal civil rights cases.

In a ruling which took account both of the needs of the party seeking discovery in a civil case and "the preferred position which the First Amendment occupies in the pantheon of freedoms" (470 F.2d at 783), the Court sustained the ruling of a district court declining to require a journalist to divulge his confidential sources. Rejecting the argument that the *Branzburg v. Hayes* ruling of this Court\* always required disclosures of confidential sources of journalists, the Second Circuit stated:

"If, as Mr. Justice Powell noted in [*Branzburg*], instances will arise in which First Amendment values outweigh the duty of a journalist to testify even in the context of a criminal investigation, surely in civil cases, courts must recognize that the public interest in non-disclosure of journalists' confidential news sources will often be weightier than the private interest in compelled disclosure." (470 F.2d at 785)\*\*

In short, long prior to the instant case, standard discovery rules have been permitted to accommodate First Amendment interests.

Perhaps the most serious challenge to the decision of the Court of Appeals is the repeated contention of Petitioner that without the evidence sought on this appeal,

\* *Branzburg* rejected the argument of journalists who had witnessed crimes that they were not obliged to testify before grand juries with respect thereto. *Branzburg*, however, did not reject the concept that in civil cases a qualified First Amendment privilege might be held to exist with respect to the non-disclosure of confidential sources, and numerous later cases have held that such a privilege does exist. See Goodale, *Branzburg v. Hayes and the Developing Qualified Privilege for Newsmen*, 26 Hastings L.J. 709 (1975) and cases cited therein.

\*\* Other courts have subsequently ruled similarly. See, e.g., *Apicella v. McNeil Laboratories, Inc.*, 66 F.R.D. 78, 82 (E.D.N.Y. 1975); *Loadholtz v. Fields*, 389 F.Supp. 1299 (M.D. Fla. 1975).

"the possibility of proving liability" under *Sullivan* will be "effectively eliminated." (Pet. Br. 3) It is this which is at the heart of Petitioner's brief (pp. 19-36) and if it were, in fact, true that the decision of the Court of Appeals would have the effect Petitioner predicts, the decision of this Court would surely be a troublesome one. But, as Judge Oakes states:

"Actual malice can be proved in a number of ways. Logical inferences from the inconsistency, say, between a television program's content and contrary facts which a plaintiff might independently establish would provide an obvious starting point for such proof. Moreover, a plaintiff might adduce circumstantial evidence from participants or interviewees on the television program. In this case, for example, documents furnished under the Freedom of Information Act indicate that Lando's state of mind may be provable without directly impinging on the editorial process. While I offer no opinion on the admissibility or adequacy of this evidence to prove actual malice, it is clear that an editor's state of mind can be examined without discovering facts at the heart of the editorial process. Limiting discovery to those matters and persons not at the heart of the editorial process does not transform the *Sullivan* rule into a nullity for putatively libeled public figures. They can prove actual malice without endangering the editorial process which *Tornillo* held to be protected by the First Amendment." (Pet. 39a-41a; emphasis in original, footnotes omitted). See also Pet. 22a (Opinion of Kaufman, C.J.).

That this statement is accurate may be seen by applying it to the present case. Here, Herbert already has been provided with an enormous—"staggering," in Judge Kaufman's language (Pet. 19a)—amount of material and information. If there were actual malice here, surely mate-

rials of this scope and nature\* should reflect an objective manifestation of the actual knowledge of falsity or reckless disregard for the truth. In that respect, this Court indicated in *St. Amant v. Thompson, supra*, that proof of "reckless disregard" might well be adduced

"where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will [the press] be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports." (390 U.S. at 732; footnote omitted)\*\*

\* "Lando answered innumerable questions about what he knew, or had seen; whom he interviewed, intimate details of his discussions with interviewees; and the form and frequency of his communications with sources. The exhibits produced included transcripts of his interviews; volumes of reporters notes; videotapes of interviews; and a series of drafts of the '60 Minutes' telecast. Herbert also discovered the contents of pre-telecast conversations between Lando and Wallace as well as reactions to documents considered by both. In fact, our close examination of the twenty-six volumes of Lando's testimony reveals a degree of helpfulness and cooperation between the parties and counsel that is to be commended in a day when procedural skirmishing is the norm." (Pet. 19a; footnote omitted) (Opinion of Kaufman, C.J.)

\*\* Petitioner's suggestion that plaintiffs will be unable to adduce evidence of ill will in light of the ruling of the Court of Appeals simply misses the point. (Pet. Br. 28n) This Court, in a series of rulings further explaining the *Sullivan* standard, emphasized that the "actual malice" *Sullivan* required is not ill will or bare intent to inflict harm, but intent to inflict harm through falsehood. *Greenbelt Cooperative Publishing Ass'n, Inc. v. Bresler*, 398 U.S. 6 (1970); *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81 (1967); *Rosenblatt v. Baer*, 383 U.S. 75 (1965); *Henry v. Collins*, 380 U.S. 356 (1965); *Garrison v. Louisiana, supra*. As a recent Wyoming case pointed out, holdings of this Court in cases such as *Beckley Newspapers Corp. v. Hanks, supra*, and *Rosenblatt v. Baer, supra*, "make it clear that bad or corrupt motives, spite, hostility, ill will,

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It has, as well, been recognized, in contexts far removed from any discussion of editorial privilege, that notwithstanding the subjective nature of the actual malice test, such state of mind "is ordinarily inferred from *objective facts*," *Washington Post Co. v. Keogh, supra*, 365 F.2d at 967-68 (emphasis added).\*

There is, in short, no reason to believe that those libel plaintiffs who would have been able to demonstrate actual malice in the past will be prevented from doing so under the approach adopted by the Court of Appeals; on the other hand, the unacceptable threat to robust debate

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or deliberate intention to harm are not material with respect to the definition of actual malice set forth in *New York Times Co. v. Sullivan, supra*. *Adams v. Frontier Broadcasting Co.*, 555 P.2d 556, 563 (Wyo. 1976).

\* This is true, as well, in the vast majority of cases where "state of mind" is relevant, including the great bulk of criminal cases where the Fifth Amendment stands as a barrier to direct inquiry. Recognized and applied time and again by the courts is the proposition that the state of mind necessary to sustain criminal liability is "seldom provable by direct evidence but may be inferred from all the facts and circumstances of a case which reasonably tend to show a mental attitude." *United States v. Fleming*, 479 F.2d 56, 57 (10th Cir. 1973). The requisite state of mind can, and often must, be proved circumstantially—"inferred from conduct and circumstantial evidence, upon which reasonable inferences may be based." *United States v. Curtis*, 537 F.2d 1091, 1097 (10th Cir. 1976), *cert. denied*, 429 U.S. 962 (1977).

Similarly, in cases arising in the area of securities law, circumstantial evidence may itself be "highly persuasive evidence" of state of mind and may "amply demonstrat[e] defendants' guilty knowledge and intent." *Weitzman v. Stein*, 436 F.Supp. 895, 903-04 (S.D.N.Y. 1977). Many plaintiffs "necessarily rely upon circumstantial proof of knowledge," and state of mind may be based on "inference drawn from the evidence." *In re Equity Funding Corp. of America Securities Litigation*, [1976-77 Transfer Binder] CCH Fed.Sec.L.Rep. ¶ 95,714 at 90,474 (C.D.Cal. 1976). Given "the practical problem of proof" and the unique circumstances of each case, "[p]roof of a defendant's knowledge or intent will often be inferential." *Rolf v. Blyth, Eastman Dillon & Co.*, 570 F.2d 38, 47 (2d Cir. 1978).

created by intrusive discovery into the editorial process will be avoided by that approach.

There remains the question of the scope of the protection to be afforded editorial process decisions of the press. In determining what degree of protection to afford the editorial process during discovery in a *Sullivan* libel case, the Court of Appeals had to choose from among three possible levels of protection. Judge Oakes summarized the the options as follows:

"First, we might conclude as did the lower court that *Sullivan* has struck the ultimate appropriate balance so that the libel plaintiff must be permitted a level of discovery coterminous with the substantive law of constitutional libel. If so, then the plaintiff would be permitted to inquire into every aspect of the defendant's state of mind at the discovery stage with little or no inhibition. Second, we might decide that while *Sullivan* has generally struck the substantive balance, it does not preclude restraint on compelled discovery, specifically where First Amendment values are unnecessarily threatened by the nonconstitutional interest in liberal discovery. We could adapt the test developed in the disclosure of confidential source cases: evidence of the editorial process is discoverable only when it is *direct* evidence of a *highly* relevant matter which cannot otherwise be obtained. And finally, we might opt for the conclusion that the editorial process is subject to constitutional privilege and that actual malice must be proved by evidence other than that obtained through compelled disclosure of matters at the heart of the editorial process." (Pet. 38a-39a; emphasis in original, footnote omitted)

In concluding "that actual malice must be proved by evidence other than that obtained through compelled dis-

closure of matters at the heart of the editorial process" (Pet. 39a), the Court carefully considered and rejected—correctly, we believe, for the reasons set forth throughout this brief—what Judge Oakes referred to as "[t]he argument of strict logic—that the *Sullivan* test of knowing-or-reckless-falsity assumes open-ended discovery for the purpose of proving actual malice. . . ." (Pet. 39a)

Confronted, then, with the choice of whether or not the scope of the protection afforded the editorial process should be qualified, the Court rejected the "compromise position" (Pet. 43a) not only because of the inhibitory effect engendered by any compulsory disclosure of the editorial process, but also in light of the inherent vagueness and difficulty of application of a qualified privilege. As Judge Oakes concluded: "In effect, the discovery process itself, and the resulting litigation over the 'directly-related,' 'highly-relevant' and 'otherwise-unobtainable' standards, are not merely likely to make editors more cautious, but inevitably will require them to be." (Pet. 43a-44a)\*

## CONCLUSION

This appeal plainly involves far more than whether one journalist in one case should be obliged to be deposed for still a 27th day, notwithstanding the fact that the extraordinary length of the deposition itself is suggestive of the need, at long last, to call it to a halt. Nor are the issues raised ones which are unique to this case or its facts or its parties. Whatever this Court's decision, the ruling will be as

\* A qualified protection of the editorial process was also rejected because such an approach was developed in an entirely different context from the present case—namely, where "the information sought to be disclosed, whether or not vital to the plaintiff's case, was far removed from the editorial process." (Pet. 44a) See *Baker v. F&F Investment, supra*; *Garland v. Torre*, 259 F.2d 545 (2d Cir.), cert. denied, 358 U.S. 910 (1958).

applicable in libel actions by powerful public officials as it is to this plaintiff and as applicable to suits against small and easily threatened defendants as it is to these defendants.

Much of the unhappiness of the experiences of journalists abroad has been in the area of interrogation—of being required to respond to official inquiries as to why certain material was printed rather than other material. The District Court opinion in this case would have—apparently routinely—permitted just such inquiries by public officials and public figures who have commenced libel actions. Based upon decisions of this Court, the Court of Appeals reversed, and in so doing, eloquently reaffirmed First Amendment principles. We urge this Court to affirm that ruling.

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Supreme Court, U. S.  
FILED

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1977

No. 77-1105

ANTHONY HERBERT,

*Petitioner,*

—against—

BARRY LANDO, MIKE WALLACE, COLUMBIA BROADCASTING  
SYSTEM, INC., ATLANTIC MONTHLY COMPANY,

*Defendants,*

BARRY LANDO, MIKE WALLACE and CBS INC.,

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SECOND CIRCUIT

**REPLY BRIEF FOR PETITIONER**

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Minority Report on Repeal of the Sedition Act, Feb- ruary 25, 1799, Annals of Congress, 5th Congress, 3d Sess. pp. 2987-2990, 3003-3014, reprinted in part in L. Levy, <i>Freedom of the Press from Zenger to Jef- ferson</i> 171 (1966) .....	20

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The Pound Conference Follow-Up Task Force, 74 F.R.D. 159 (1976) .....	10
<i>The Virginia Report of 1799-1800</i> , reprinted in part in L. Levy, <i>Freedom of the Press From Zenger to Jefferson</i> 197 (1966) .....	20
Tunis Wortman, <i>A Treatise Concerning Political En- quiry</i> , 1800, reprinted in part in L. Levy, <i>Freedom of the Press From Zenger to Jefferson</i> 230 (1966) .....	21

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1977

No. 77-1105

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ANTHONY HEEBERT,

*Petitioner,*

—against—

BARRY LANDO, MIKE WALLACE, COLUMBIA BROADCASTING  
SYSTEM, INC., ATLANTIC MONTHLY COMPANY,

*Defendants,*

BARRY LANDO, MIKE WALLACE and CBS INC.,

*Respondents.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SECOND CIRCUIT

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**REPLY BRIEF FOR PETITIONER**

Petitioner ("plaintiff") submits this reply brief to respond to certain arguments contained in the Brief of Respondents ("defendants") ("Def. Br."), the amici curiae briefs of the New York Times, *et al.* ("amici Br.") and the American Newspaper Publishers Association ("ANPA Br.").

### Summary of Argument

Defendants and amici have erroneously portrayed the District Court opinion as failing to consider the factual context of the disputed questions and the First Amendment concerns involved. Judge Haight grounded his decision on the principles of *Sullivan*, examined the centrality of defendants' subjective state of mind to the issues in the case, required that the discovery sought be relevant to that critical issue and found that the disputed inquiries were designed to obtain the most direct proof of that issue.

Defendants and amici attempt to create an issue of discovery abuse which is not justified by the history of this case or the nature of the disputed discovery. The conflict between the parties has not involved an issue of unrestrained or overbroad discovery. The questions relate to specific matters relevant to the central issue of defendants' state of mind regarding the truth or falsity of the published matters. The extent of discovery conducted by plaintiff has been no greater than required in light of the activities of defendants in preparing the Program. Defendants cannot show that the judiciary will be unwilling or unable to regulate the proper bounds of discovery or that there is any rational basis for believing that such discovery of relevant facts from the press has or will deter it from its constitutional functions.

Defendants and amici attempt to support the Court of Appeals decision by removing this case from the framework of *Sullivan* principles and placing it within a structure consisting of cases involving governmental restraint or compulsion of publication and cases involving the privilege of confidentiality for governmental decision-making. Reliance upon these cases, together with allusions to dangers signified by interrogations conducted in other so-

cieties or before Congressional committees during periods of our own history, while ignoring analogous cases wherein this Court declined to hold that the First Amendment required concealment by some of evidence required of all others, fails to support the creation of a new and absolute privilege.

The editorial process privilege created by the Court of Appeals deprives *Sullivan* plaintiffs of the opportunity to obtain direct evidence of actual malice and precludes proof of a substantial portion of what might possibly constitute circumstantial evidence. The substantial deprivation of the ability of a plaintiff to prove his case cannot be minimized by references to criminal cases where defendants do not testify because of the Fifth Amendment Privilege or to cases where the required state of mind is defined by an objective standard. In contrast, the alleged chilling effect on the press by the disclosure here sought is purely speculative. The factors found in *Zurcher v. The Stanford Daily*, — U.S. —, 56 L.Ed.2d 525 (1978) as a sufficient safeguard against any incremental chilling effect are even more substantial in the present case.

## ARGUMENT

### POINT I

#### **Defendants Fundamentally Misdescribe the District Court's Consideration of the Factual Context of the Disputed Questions and Recognition of First Amendment Concerns.**

Defendants would have this Court believe that the disputed questions were never considered by the District Court specifically or within their factual context and that, therefore, the District Court could not and did not reach any factual conclusions as to those questions (*see, e.g.*, Def. Br. pp. 5n, 14n, 61). The history of this litigation disproves defendants' contention.\*

After considering the factual context of the questions and their relationship to the issues that must be proven, Judge Haight rejected defendants' objections:

The first five areas of dispute . . . relate to Lando's conclusions, opinions, and intentions, formulated during the period of time that he was researching and preparing the television program and the Atlantic article, with particular reference to people or leads to be pursued or not to be pursued, the veracity of per-

\* A list of the specific questions in dispute and the deposition transcripts were before the District Court. Defendants separated the disputed questions into defined areas of inquiry. These categories were adopted by the District Court in determining the relevancy of the questions. (P 57a) Plaintiff presented a detailed factual statement to "provide a context for ascertaining the relevancy of the questions which the witnesses have refused to answer" (Rec. Doc. 55—Pl. Memo. of Law to Dist. Ct. 7, 6; *see* pp. 6-20). Defendants broadly objected to the questions (Rec. Doc. 54—Def. Memo. of Law to Dist. Ct. pp. 17-21, 23-24, 25-30).

sons interviewed, and the reasons why certain material was included or excluded.

\* \* \*

. . . Where, as here, the defendant's state of mind is of central importance to a proper resolution of the merits, it is obvious that these lines of inquiry may lead, directly or indirectly, to admissible evidence. As in all cases, civil or criminal, turning upon the state of an individual's mind, direct evidence may be rare; usually the trier of the facts is required to draw inferences of the state of mind at issue from surrounding acts, utterances, writings, or other indicia. . . .

\* \* \*

The publisher's opinions and conclusions with respect to veracity, reliability, and the preference of one source of information over another are clearly relevant. . . .

\* \* \*

The lines of inquiry under discussion are entirely appropriate to Herbert's efforts to discover whether Lando had any reason to doubt the veracity of certain of his sources, or, equally significant, to prefer the veracity of one source over another. It is quite apparent that Col. Herbert, at the times in question, was a controversial figure, highly regarded in certain quarters, but viewed with considerably less favor in others. Herbert is entitled to full discovery on these lines of inquiry. . . .

(P 64a-66a)\*

\* Before the Court of Appeals, defendants continued to press for a broad ruling that matters involving the editorial process be shielded from inquiry rather than consideration of each disputed question (Def. Br. to Court of Appeals, pp. 7-8; *also see* J. Oakes, concurrence P 25a). Plaintiff, on the other hand, specifically discussed the factual context of the disputed questions and their particular relevancy to the issue of actual malice (Pl. Br. to Ct. of Appeals, pp. 9-16, 45-49).

Defendants and amici further miscast Judge Haight's decision as ignoring all First Amendment concerns while declaring that *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), had nothing to do with this case. (Def. Br. p. 13; amici Br. pp. 7-8) In fact, the District Court decision is grounded upon a full recognition of First Amendment concerns. Judge Haight described the kinds of statements that are not entitled to constitutional protection and noted that unprotected false statements made in reckless disregard of the truth require proof that the publisher in fact entertained serious doubts as to the truth of the publication ( P 59a-61a). The Court thus faithfully followed the principles of *New York Times v. Sullivan*, 376 U.S. 254 (1964), as to the limited group of statements not entitled to First Amendment protection and the nature of reckless falsehood within that group. The Court proceeded to analyze the significance of the disputed questions to proving the subjective state of mind requisite to establishing reckless disregard. Judge Haight found that "nothing in the First Amendment requires" denying discovery on the crucial issue (P 63a). The Court then determined whether the particular areas of inquiry might lead, directly or indirectly, to admissible evidence as to defendant's state of mind—an issue "of central importance to a proper resolution of the merits." (P 64a)\*

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\* In his subsequent decision certifying an interlocutory appeal, Judge Haight described his earlier decision directing defendants to answer the disputed questions:

As this Court observed in its original opinion, the proper breadth and scope of such a plaintiff's pre-trial discovery \* \* \* must be determined within the context of considerations that arise out of *New York Times v. Sullivan*, 376 U.S. 254 (1964) and its progeny. Those considerations include: the scope of protection given by the First Amendment to publishers or other media who direct their attentions to "public figures"; the bases upon which such figures may hold publishers and media liable for defamation, notwithstanding that First Amendment protection; and the proper function of pre-trial

Judge Haight's analysis of *Tornillo* was obviously not made in a vacuum. It began with the statement that *Tornillo* and *Columbia Broadcasting System, Inc., v. Democratic National Committee*, 412 U.S. 94 (1973) "deal with statutes or regulations purporting to specify what newspapers or broadcasting stations must print or say", concluding with a sentence which reads in full "These cases have nothing to do with the proper boundaries of pre-trial discovery in a defamation suit alleging malicious publication." (P 67a) Judge Haight's view of *Tornillo* was entirely consistent with the decisions of this Court which have repeatedly found that the appropriate measure of First Amendment protection is determined by the nature of the particular governmental or state action involved, rather than the particular media function (see Pl. Br. pp. 36-41).

## POINT II

### Defendants Erroneously Characterize This Case as One of Discovery Abuse.

Both defendants and amici would have this Court believe that the issues presented here for review arise in and turn upon the context of discovery abuse.\* Although there is no dispute over the fact that Lando's deposition transcript

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discovery procedures, having in mind the plaintiff's bases of liability, the burden of proof he bears, and the defendant's First Amendment rights. (P 91a-92a)

\* The brief of amici contains serious inaccuracies and misperceptions. There is no evidence whatever, for example, to support the remarkable assertion (amici Br., pp. 7, 22) that plaintiff's discovery "served to immobilize one of CBS' leading investigative news teams for more than a year"; defendants did *not* "provide [ ] all requested material" (amici Br., p. 6); the agreement of counsel concerning the sequence of discovery (amici Br., p. 6) covered only the subject of depositions, and Herbert provided thousands of pages of documents to defendants in response to demands pursuant to F.R.C.P. Rule 34.

numbers 2903 pages and that 240 exhibits were marked for identification, assertions that plaintiff has misused and abused the discovery rules or that the District Court's order "perverts" those rules (Def. Br., p. 25) are simply incorrect.

The Lando deposition followed the production by defendants of most of Lando's notes and memoranda pertaining to interviews conducted by him in the course of his work on the Program and the Article. The bulk of these notes was in Lando's handwriting; of necessity, some portion of the deposition was concerned with the mere deciphering of this handwriting so that it could be understood. Still more deposition time involved seeking clarification of abbreviations, initials, disjointed words in lieu of full sentences, and times, places and persons involved or referred to in these notes. The time and expense involved in this necessary pursuit fell as heavily upon plaintiff as upon defendants. When this portion of the Lando deposition is eliminated, the total length of the transcript pertaining to actual questions and answers is substantially reduced. (Cf. P 19a, n. 18.)

Plaintiff, of course, supports efforts to analyze the causes and supply the answers to problems of abuse of the liberal discovery provisions of the Federal Rules. The cases, addresses and other thoughtful materials cited by defendants and amici directed to this problem do not, however, go to the issues raised on this appeal in the unique factual setting of this defamation action.\*

Carefully built into the Federal Rules are specific provisions designed to protect a party from harassing, burden-

\* While defendants liberally cite authorities expressing concern over discovery excesses and their concomitant effect upon the burdens imposed upon the federal judiciary, they omit reference to the fact that their document demands of Herbert required his production of *more than 11,000 pages* of materials with the expectation of more demands to come.

some or unfounded discovery. Rule 26(c) specifically provides for issuance of protective orders to protect any moving party from "annoyance, embarrassment, oppression, or undue burden or expense." Defendants did not raise below any claim that plaintiff's discovery efforts had been harassing or abusive in any manner.\* The discovery disputes here arise pursuant to plaintiff's motion to compel answers, not defendants' request for protective relief.

Much of the argument now presented by defendants and amici addressed to the "potential" for abuse of discovery processes (*See, e.g.*, Def. Br. pp. 19-20, 24-26; amici Br. 21-26), apparently assumes that trial judges will be unable or unwilling to fairly evaluate claims that discovery processes are being abused and call an appropriate halt when processes (*See, e.g.*, Def. Br. pp. 19-20, 24-26; amici Br. pp. such abuse is found. As this Court most recently noted in *Zurcher v. The Stanford Daily*, *supra*, 56 L.Ed.2d at 542, predicted or potential abuses of traditional court processes do not justify special rules for the press where sufficient controls exist to prevent abuse. Mr. Justice Powell, concurring in *Zurcher*, *supra*, pointed to precisely such available protections when he noted that due regard for First Amendment concerns and for normal guideposts of reasonableness and particularity would minimize perceived dangers of unrestrained or limitless inquiry:

. . . [T]he magistrate must judge the reasonableness of every warrant in light of the circumstances of the particular case, carefully considering the description of the evidence sought, the situation of the premises,

\* The suggestion that the course of discovery here reflects "retaliatory" objectives by Herbert (amici Br., pp. 12, 26-28) completely disregards the substantial societal interests served by providing legal redress for damage to reputation. In the factual setting of this action, such an unfounded accusation is nothing short of remarkable. Cf. P 19a and n. 19.

and the position and interests of the owner or occupant.

(56 L.Ed.2d at 544)

While discovery here may have been extensive, there is no basis for finding that plaintiff had stepped beyond the permissible bounds of the Federal Rules in utilizing appropriate discovery techniques.\* There is also no basis for the more generalized claim that application of the discovery rules to this specific legal and factual setting would chill First Amendments rights.\*\*

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\* Commentators on potential discovery abuse and the need to seek additional guidance in curbing such potential have been careful to note that remedies must be fashioned "which will neither impose undue burdens on the courts nor prove unfair to litigants with genuine need for extensive discovery." *The Pound Conference Follow-Up Task Force*, 74 F.R.D. 159, 192 (1976).

\*\* *Zurcher* rejected the claim that such a chill would occur if search warrants could issue against newspapers. "The fact is that respondents and amici have pointed to only a very few instances in the entire United States since 1971 involving the issuance of warrants for searching newspaper premises. This reality hardly suggests abuse, and if abuse occurs, there will be time enough to deal with it. . . ." 56 L.Ed. 2d at 542. Cf. *Gravel v. United States*, 408 U.S. 606, 629, n.18 (1972). That abuse of discovery exists in some cases, has never been treated as a basis for denying extensive discovery in other cases. The press has not been chilled to date by the knowledge that such discovery might occur.

### POINT III

**Defendants Erroneously Attempt to Support the Court of Appeals Decision by First Amendment and Privilege Cases Not Applicable to *Sullivan* Libel Actions or the Disclosure Issues Involved herein.**

#### *Restraint and Control of the Press Cases*

As noted in plaintiff's principal brief (pp. 36-41), the District Court order here involved neither prior restraint nor subsequent compulsion to publish anything. The day-to-day exercise of "editorial control and judgment" by the media referred to in *Tornillo*, 418 U.S. at 258, as beyond legislative determination and direction is not thereby placed beyond the reach of compulsory judicial process in a defamation action seeking redress for the publication of malicious falsehoods. Defendants cite the opinion of the Chief Justice in *Houchins v. KQED, Inc.*, 46 U.S.L.W. 4830, 4832 (U.S. June 26, 1978) (Def. Br. p. 29), which notes that "the government cannot restrain communication of whatever information the media acquires—and which they elect to reveal" as supportive authority for the *per se* rule enunciated by the Court of Appeals, which is grounded upon equating prior restraint with subsequent accountability. The media's right to gather and receive information and to decide which information collected will be imparted to the public and in what form is not at issue here. What is at issue is whether a Court may conclude in a libel action that relevant evidence in the media's sole possession may properly be disclosed to shed light on the central issue of whether the decision to impart information was made in knowing or reckless disregard of its falsity.\*

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\* Similarly not at issue here are the practices of societies which do not follow our First Amendment in concept or structure (Def.

The “*sine qua non* of responsible journalism” (P 13a) may indeed involve the weighing and testing of hypotheses before the election is made to release information to the public. But it is *not* “responsible” journalism which is at issue in a libel case; and it is not some distant judge idly toying with daily newsroom decisions whose aid is sought in libel discovery matters. It is a victim of the breakdown of responsibility—a member of the public on whose behalf the press functions and for whom First Amendment protections are intended—who seeks the Court’s assistance in redressing the damage caused. If the evidence in a libel action discloses the actual malice *Sullivan* demands, “responsible” journalism suffers no injury but is enhanced and assured.

#### **Confidentiality of Governmental Deliberations**

Defendants seek to support the conclusion that the editorial process is immune to relevant inquiry with the claim that historic, constitutionally-based protections accorded the executive, legislative and judiciary apply with equal force to the media as a fourth branch of government. In *United States v. Nixon*, 418 U.S. 683 (1974) this Court considered a Presidential claim of privilege based upon “the valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties.” *Id.* at 705. The Court held that the claimed executive privilege, although “derive[d] from the supremacy of each branch within its own assigned area of constitutional duties,” *id.*, was *not* absolute and unqualified, *id.* at 706:

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Br. pp. 30-32 and n.\*) or the tragic departure in our own history from these dictates (*e.g.*, pp. 32-34 n. \*\*). To suggest, for example, that District Judge Haight’s order is comparable to Senator McCarthy’s abuse of legislative powers is surely to discredit the ability of any and all federal judges to properly carry out their role consistent with the Constitution’s demands.

The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.

*Id.* at 709.

Defendants urge that the “presumptive,” but nonetheless qualified, constitutional privilege which this Court held attaches to Presidential communications in its *Nixon* decision supports a greater protection to the press—an absolute privilege—to resist compulsory process seeking full disclosure of all the facts relevant to the issues before the Court. Yet an absolute “editorial process” privilege would preclude precisely this proof without even particularizing any concrete injury which would flow from disclosure of this relevant evidence in a particular libel case.\* As the *Nixon* opinion further clarifies, neither creation of new privileges nor expansion of existing ones are lightly viewed by the courts:

Because of the key role of the testimony of witnesses in the judicial process, courts have historically

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\* Defendants quote Chief Justice Burger’s statement concerning the teaching of “human experience,” *id.* at 705, where there is an expectation that remarks may be publicly disseminated and assert that that statement answers Judge Meskill’s requirement that claims of chilling effect depend on proof supplied by the parties (P 52a) (Def.’s Br. p. 36 and n). Yet this Court specifically concluded in *Nixon* that advisors would not be moved “to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution” 418 U.S. at 712. It is pure conjecture to suggest that the press nevertheless would temper its candor because disclosure might be called for in a *Sullivan* action of areas concretely shown to be relevant to an issue in the case.

been cautious about privileges. Mr. Justice Frankfurter, dissenting in *Elkins v. United States* [364 US 206 (1960)], said of this: Limitations are properly placed upon the operation of this general principle only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending, the normally predominant principle of utilizing all rational means for ascertaining truth.

(418 U.S. at 710, n.18)

The "singularly unique role under Article II\* of a President's communications and activities, related to the performance of duties under that Article," *id.* at 715, which warranted the "presumptive" constitutionally based executive privilege, is certainly not grounds for the contention that the "editorial process" is presumptively privileged against disclosure because the First Amendment guarantees "freedom of the press." \*\*

\* "[A] President's communications and activities encompass a vastly wider range of sensitive material than would be true of any 'ordinary individual,' necessitating, 'in the public interest,' the 'greatest protection [to Presidential confidentiality] consistent with the fair administration of justice.'" *Id.*

\*\* Defendants also seek to distinguish the *Nixon* result because there the need for full disclosure arose from a constitutional guarantee while here it arises from a historical common-law right. Their citation of *Paul v. Davis*, 424 U.S. 693 (1976) (Def. Br. p. 37 n\*) following the comment that "here a First Amendment right is pitted against a common-law cause of action not directly rooted in the Constitution" is difficult to explain in light of the fact that it was the *Sullivan* decision that struck the balance between First Amendment rights and the common-law action while *Paul v. Davis* merely considered the status of a defamation action for purposes of invoking the Due Process Clause. Obviously, this Court in *Sullivan* was well aware of the common-law roots of defamation actions in preserving that action against the press where a showing of actual malice is made.

The cases cited by defendants (Def. Br. pp. 37-39) are inapposite to the situation posed here. *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318 (D.D.C. 1966), *aff'd per curiam sub nom. V.E.B. Carl Zeiss, Jena v. Clark*, 384 F.2d 979 (D.C. Cir.), *cert. denied*, 389 U.S. 952 (1967), for example, held that "documents integral to an appropriate exercise of the executive's decisional and policy-making functions," 40 F.R.D. at 324, were immune from production by the Government in a litigation to which it was not a party (emphasis added). The Court observed that even generally meritorious claims of executive privilege were not without exception:

To restate the Government's claim and its justifications is not to say that non-disclosure is to follow in all instances where the conditions prerequisite to invoking the privilege are found to exist. *Nor is it to suggest that the interests it protects cannot be outweighed in particular situations by a sufficiently strong showing of necessity for examination. . . .*

(*id.* at 327; emphasis added)

Executive privilege has not been held to immunize the government from discovery where questions of bad faith are involved or where there has been a *prima facie* showing of impropriety. Thus, in *Citizens To Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), this Court held that the mental process of governmental decision-makers could be the subject of judicial scrutiny where such inquiry might be essential to effective review of a claim that the Secretary of Transportation had exceeded the scope of his authority under the Federal-Aid Highway Act in approving highway construction through a public park. In remanding the case to the District Court for review of the Secretary's decision. Mr. Justice Marshall explained that

review was to be directed beyond "the full administrative record that was before [him] at the time he made his decision", because "the bare record may not disclose the factors that were considered or the Secretary's construction of the evidence". Thus, the District Court was held entitled to require "some explanation in order to determine if the Secretary acted within the scope of his authority and if the Secretary's action was justifiable under the applicable standard." *Id.* at 420. The proper basis for distinguishing the "general bar against probing 'mental processes' of administrative decision-makers" (*cf.* Def. Br., p. 37n\*\*\*) from a judicial proceeding where state of mind is a crucial inquiry was explained as follows:

The court may require the administrative officials who participated in the decision to give testimony explaining their action. Of course, such inquiry into the mental processes of administrative decision-makers is usually to be avoided. [Citing *United States v. Morgan*, 313 U.S. 409, 422 (1941).] And where there are administrative findings that were made at the same time as the decision, as was the case in *Morgan*, there must be a strong showing of bad faith or improper behavior before such inquiry may be made. But here there are no such formal findings and *it may be that the only way there can be effective judicial review is by examining the decision-makers themselves.* See *Shaughnessy v. Accardi* [349 U.S. 280 (1955)].

*Id.* (emphasis added)

See also: *KFC National Management Corp. v. N.L.R.B.*, 497 F.2d 298, 305 (2d Cir. 1974), *cert. denied*, 423 U.S. 1087 (1976); *Smith v. Schlesinger*, 513 F.2d 462 (D.C. Cir. 1975).\*

\* Cases cited in the ANPA brief (pp. 7-10) wherein "opinion" discovery was denied are, of course, not dispositive of any discov-

The qualified common-law executive privilege concerning matters of an advisory or evaluative nature is designed to permit unfettered policy-making by government officials.\* Numerous decisions have recognized that this qualified claim must be determined on a case-by-case basis. See, e.g., *Wood v. Breier*, 54 F.R.D. 7, 12-13 (E.D.Wisc. 1972).\*\* See also: *Jabara v. Kelly*, 62 F.R.D. 424, 425-431

ery claim where a party's state of mind is a central fact to be proven or disproven in the case. The Court in *Frankenhauser v. Rizzo*, 59 F.R.D. 339 (E.D.Pa. 1973), for example, ordered disclosure, over a claim of governmental privilege, of substantial portions of witness statements and police reports. Its direction that evaluative, opinion data be excised was founded upon the premise that such material was not central to the issues in the case.

\* General policy decisions by CBS or any other media institution or member are, of course, not involved in this case. Neither plaintiff nor the District Court sought compelled disclosure of random, ongoing editorial positions or actions. Defendants, however, appear to view this disclosure differently when they describe the questions asked by Senator Joseph McCarthy to James Wechsler at a Congressional Hearing as "precisely the questions put to Mr. Lando." (Def. Br. p. 32 and footnote \*\*) Lando was asked questions concerning his specific conclusions, bases and intentions in reference to particular materials investigated or presented on the Program where contradictions or other aspects of those discovered materials bore on the issue of whether defendants entertained serious doubts as to matters aired. The questions put to Mr. Wechsler were broad inquiries concerning the general editorial policy of the publisher to praise or criticize J. Edgar Hoover, the F.B.I. and the Chairman of the House Un-American Activities Committee and the publisher's opinion of the heads of that Committee and of whether Senator Jenner was doing a good job. To be concerned about the inquiries undertaken by Senator McCarthy of the press (and of members of the general public as well) does not, we submit, require, or even suggest, that one must oppose the efforts of a plaintiff in a *Sullivan* libel action to obtain direct proof of the critical issue of the reporter's subjective state of mind by asking specific questions on particular materials discovered which bear on the issue of whether the reporter knew that the published material was false or entertained serious doubts as to the truth of that material.

\*\* In *Wood* the executive privilege claim included the argument that production would have a chilling effect upon the department's ability to obtain full and candid police reports. The Court rejected

(E.D.Mich. 1974), and cases cited therein; *Community Savings & Loan Ass'n. v. Federal Home Loan Bank Bd.*, 68 F.R.D. 378, 381-382 (E.D.Wisc. 1975) and cases cited therein (ordering disclosure of opinions, evaluations and recommendations by federal agency).\*

### **Speech and Debate Clause**

Defendants urge that the absolute editorial process privilege finds justification in the protections afforded under the Speech and Debate Clause to members of Congress and their aides, citing *Gravel v. United States*, 408 U.S. 606 (1972). There the Court defined the purpose of the Speech and Debate Clause as

designed to assure a co-equal branch of the government wide freedom of speech, debate, and deliberation without intimidation or threats from the Executive Branch. It thus protects Members against prosecutions that *directly* impinge upon or threaten the legislative process.

(408 U.S. at 616, emphasis added)

However, this Congressional privilege does not absolve legislators or aides from responsibility for criminal conduct, *id.* at 615, 626, nor from ever being accountable for infringing the rights of others. *Id.* at 618-621. The Court specifically refused to find that the Senator's alleged arrangement with the publishing company was conduct pro-

the claim, noting that such contentions "viewed through legal eyes" were "at best of remote impact." 54 F.R.D. at 13.

\* The Freedom of Information Act exemption for intra-agency and inter-agency memoranda, 5 U.S.C. §552(b)(5), merely sets limits upon the ability of a member of the public to obtain particular documents from government files. It does not prevent a private litigant who can "override a privilege claim set up by the Government" depending "on the extent of the litigant's need in the context of the facts of his particular case, or on the nature of the case," *N.L.R.B. v. Sears Roebuck & Co.*, 421 U.S. 132, 148 n. 16 (1975), from obtaining such documents.

ected by the Speech and Debate Clause, warranting disclosure immunity for either the Senator or the publisher. *Id.* at 625-626.

The First Amendment immunity claims raised by Beacon Press and various scholars were rejected by the lower courts. *See: United States v. Doe (In re Falk)*, 332 F. Supp. 938, 941-942 (D.Mass. 1971):

... Here ... the government has indicated the specific statutory offenses which it is investigating, ... and the reasonableness of such investigation is supported by the fact that at least some of the Pentagon Papers, or copies thereof, were possessed by persons in Massachusetts, since portions were published by a Boston newspaper. *Where the investigation is thus focused, the Court will not presume that men of substantial intelligence and good intent will be inhibited from pursuing otherwise lawful activity; it is more rational, and more likely that such persons will presume that the grand jury process will not be misused against them.\**

\* In a footnote, the Court presaged the very point urged by Judge Meskill below in dissent that judicial review is "supposed to" have a chilling effect upon "the publication of lies" (P 46a): "The issue of the legality of Professor Falk's information and sources is not before the court and for purposes of this decision the information is presumed both lawful and of public value. Obviously, sources of illegally revealed information may and must be 'inhibited' by investigation and prosecution." 332 F.Supp. at 941, n.2 (emphasis added). *See also: Appleyard v. Transamerican Press, Inc.*, 539 F.2d 1026, 1030 (4th Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977); *Mahen v. Hughes Tool Co.*, 569 F.2d 459, 479-480 (9th Cir. 1977); *cf. F.C.C. v. Pacific Foundation*, — U.S. —, 56 L.Ed.2d 697 (1977).

***The Framers Accommodation of Defamation Actions and a Free Press***

Defendants have concluded that the Framers of the Constitution intended to accord to liberty of the press a special significance and a critical position in the hierarchy of freedoms. (Def. Br. p. 51) This conclusion, however, offers all the more reason to sustain plaintiff's position. In their analysis of First Amendment history defendants ignore the fact that the strongest advocates of freedom of the press in eighteenth century America, upon whom they rely for their conclusion, viewed a private right of action by public officials in state courts for reparations for injury to reputation as perfectly compatible with the highest degree of protection for the press from governmental restraint.

James Madison in his *Report of the Virginia Resolutions of 1798*, cited by defendants (Def. Br. p. 53), points out that the policy of the Constitution is one of

... binding the hand of the federal government from touching the channel which alone can give efficacy to its responsibility to its constituents; and of leaving those who administer it, to a remedy for their injured reputations, under the same laws, and in the same tribunals, which protect their lives, their liberties, and their properties.

*The Virginia Report of 1799-1800*, reprinted in part in L. Levy, *Freedom of the Press From Zenger to Jefferson* (1966), pp. 197, 220. (Emphasis added)\*

\* Similarly, the Republican writer of the *Minority Report on Repeal of the Sedition Act* was careful to note that the rights of public officers to restitution for injury from defamation were preserved by private libel actions in the state courts. (*Minority Report on Repeal of the Sedition Act*, February 25, 1799, *Annals of Congress*, 5th Congress, 3d Sess. pp. 2987-2990, 3003-3014, reprinted in part in L. Levy *supra*, pp. 171, 186.)

While repudiating the concept of seditious libel, the libertarians of the eighteenth century assured the American people of the continuing efficacy of private libel actions to preserve the social and political values of individual reputation and a responsible press. For them the First Amendment freedoms were not threatened by the preservation of those values.\*

***Governmental Action and the Press Function***

Defendants conclude Point I of their brief, with the assertion that what is "at stake in this appeal" is the rule "that the government may not use a peculiarly govern-

\* George Hay's *Essay on Liberty of the Press* expressed the libertarian thesis:

The absolute freedom then, or what is the same thing, the freedom, belonging to man before any social compact, is the power uncontrouled by law, of doing what he pleases, *provided he does no injury to any other individual*. If this definition be applied to the press, as surely it ought to be, the press, if I may personify it, may do whatever it pleases to do, uncontrouled by any law, *taking care however to do no injury to any individual*. This injury can only be by slander or defamation and reparation should be made for it in a state of nature as well as in society. "Hortensius" (George Hay) *An Essay on the Liberty of the Press* (Richmond, Va., 1803), pp. 21-30 (reprint of original, Philadelphia, 1799), reprinted in part in L. Levy, *supra*, pp. 186, 189.

Tunis Wortman, known as the political theorist of the libertarian thesis (L. Levy, *supra*, p. 229), as well saw the need to maintain a balance between the interest of the individual public officer in protecting his good name from the abuses of a sometimes irresponsible press and the freedom of the press:

It is far from being maintained that Slander should be suffered to exist with impunity. On the contrary, it is admitted that rational and judicious measures should be taken to deprive it of its sting. But it is contended, that private prosecutions at the suit of the injured party, are sufficient to answer every beneficial purpose, and will entirely supercede the necessity of criminal coercion. . . . Tunis Wortman, *A Treatise Concerning Political Enquiry, and the Liberty of the Press* (New York: George Foremen, 1800) reprinted in part in L. Levy, *supra*, pp. 230, 280.

mental function . . . the unlimited discovery probe . . . to invade the editorial functions of the press." (Def. Br. p. 57) This formulation reflects the problem with much of defendants' analysis. It is not the government seeking to utilize discovery, but a private citizen; it is not unlimited discovery which is sought, but the answers to questions directly involving a concededly critical issue in the case; it is not an invasion of the editorial functions of the press which is involved, but rather an attempt to ascertain post-publication whether false statements are actionable under *Sullivan* standards. No issue of restrictions upon the public's access to information is raised by the equal application to members of the media community of judicially-supervised compulsory process applicable to the general public.

As noted in plaintiff's main brief (pp. 37-39), the *Tornillo* decision's concern for protection of editorial judgments arises in a quite different context than the case now before the Court. In the words of Mr. Justice White, the "core question" in *Tornillo* was "[c]ompelling editors or publishers to publish that which 'reason' tells them should not be published," 418 U.S. at 256 (White, J., concurring). Compelled *publication* is not at issue here. Compelled disclosure of pertinent facts by a journalist-party, using the same careful standards of relevancy and need applicable to a non-journalist party, is all that the District Court ordered be done. The claim that the "editorial process" exempts the press from obligations exacted of others must thus be rejected. As Mr. Justice Powell noted in another context:

"If the Framers had believed that the press was entitled to a special procedure, not available to others, when government authorities required evidence in its possession, one would have expected the terms of the

Fourth Amendment to reflect that belief. . . . [T]here is every reason to believe that the usual procedures contemplated by the Fourth Amendment do indeed apply to the press as to every other person.

(*Zurcher v. The Stanford Daily*, *supra*, 56 L.Ed. 2d at 544 [Powell, J., concurring])

The sensitivity which this Court has displayed toward preventing governmental action from infringing upon First Amendment rights has never extended to creating absolute or even qualified privileges which apply regardless of whether specific injury is shown. Thus *Laird v. Tatum*, 408 U.S. 1, 10 (1972) declined to sustain a claim that First Amendment rights were chilled by the "mere existence, without more, of a governmental investigative and data-gathering activity that is alleged to be broader in scope than is reasonably necessary for the accomplishment of a valid governmental purpose." The Court distinguished those cases where governmental action was shown to cause a demonstrable, albeit indirect, impairment of First Amendment rights,\* and noted that

. . . [T]hese decisions have in no way eroded the 'established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained or is immediately in danger of sustaining a direct injury as a result of that action. . . .' Ex parte Levitt, 302 U.S. 633, 634, 82 L. Ed 493, 56 S. Ct 1 (1937).  
(408 U.S. at 13)

\* See, 408 U.S. at 11-13; Compare, Def.'s Br. pp. 40-45. Refusal to declare governmental action violative of the Constitution in the face of mere speculation about possible future injury is not unique. See, e.g. *Red Lion Broadcasting Co., Inc. v. F.C.C.*, 395 U.S. 367, 396 (1969); *F.C.C. v. Pacific Foundation*, *supra*.

That the press serves a critical function in our society, has a "checking value," or that its independence from government intrusion is important to our constitutional system is not in dispute here. But, as with government itself, there are occasions where conduct crosses the line from the lawful to the unlawful. Neither the First Amendment, nor any other provision of the Constitution, demands or implies that unlawful conduct may properly escape punishment because it is engaged in by one from whom better things are demanded and in whom a public trust is placed.

#### POINT IV

#### **Defendants Erroneously Argue That the Absolute Privilege for Editorial Judgment Has Not Altered the Substantive Principles of *Sullivan*.**

Defendants reject all arguments concerning the impact of the privilege created by the decision below on the ability of *Sullivan* plaintiffs to prove liability under the principles of that case. (Def. Br. p. 65) However, the reasoning in support of their position is not persuasive. While defendants quote from the opinion of Judge Oakes and a statement by this Court in *St. Amant v. Thompson*, 390 U.S. 727 (1968) (Def. Br. pp. 62, 64), regarding the possibility of inferring actual malice from circumstantial evidence, they do not address the fact that the editorial judgment privilege does actually prohibit discovery of direct and concrete evidence of a defendant's state of mind. For example, defendants simply ignore the fact that in this very case where direct proof was obtained of the reporter's doubts, awareness, and intentions as to items pertaining to the truth or falsity of subject matters involved in the publication (Pl. Br. pp. 27-28), the new privilege of editorial

judgment would render impossible the securing of such direct evidence.\*

In his opinion Judge Oakes had commented that the decision below may deprive plaintiff of the means for "adducing the best proof of malice in the common law sense of ill will toward the plaintiff" (P 41a, n. 31). Defendants conclude that such a result is of no significance since the actual malice required by *Sullivan* is not common law malice. (Def. Br. p. 64 n. \*\*) The recitation of that quite obvious principle is not, however, responsive to the fact that past decisions have treated common law malice elements as some circumstantial evidence of actual malice (see Pl. Br. p. 28, n. \*\*) and that the creation of an editorial judgment privilege precludes not only direct evidence of a defendant's awareness and doubts as to the truth or falsity of matters published, but also evidence which might constitute some circumstantial proof of defendants' actual malice.

Defendants' attempt to analogize the instant issue to the use of circumstantial evidence in criminal cases (Def. Br. p. 65 n.) is entirely misplaced. In such cases, "where the Fifth Amendment stands as a barrier to direct inquiry" as to defendant's state of mind (*id.*), the defendant does not take the stand at all. In contrast, defendants herein have testified to many matters while seeking to claim a

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\* Even the one specific item noted by Judge Oakes—information contained in the F.O.I.A. documents—may be in a precarious position as possibly within the sanctuary of nondisclosure established by the new privilege unless released by the reporter who has the privilege. Notwithstanding the specific reference to this ramification of the privilege in plaintiff's brief (p. 27, n. \*\* and p. 28, n. \*), defendants' brief is strangely silent regarding this issue, while it repeats the statement of Judge Oakes.

privilege of silence as to a critical issue.\* There is no doubt that the defendant who has taken the stand in a criminal case would have to answer questions directed at his state of mind—intent, knowledge, motive.\*\* Thus, the testimonial rules governing the operation of the Fifth Amendment Privilege lead to a result directly contrary to defendants' position: a testifying defendant is required to answer questions as to his state of mind.\*\*\*

Further, many of the areas utilizing circumstantial evidence apply an objective standard in determining whether the requisite state of mind has been proven. This standard—which looks to what a reasonable person's state of mind would be—is more susceptible to circumstantial proof than a standard which requires a finding of the subjective state of mind of the particular party. For example, a more direct evidentiary connection can be made between proof of the facts known to a reporter and the conclusion that a reasonable person given those facts would have entertained serious doubt as to the truth of materials published than between proof of such facts and the conclusion that this particular reporter did entertain serious doubts as to the truth of the published materials.

\* Not only do media defendants testify in defamation cases but they also frequently volunteer testimony specifically regarding their state of mind when it appears advantageous to do so (see cases cited at pp. 29-30 of plaintiff's brief).

\*\* It has long been recognized that defendants who take the stand in criminal cases may testify directly as to their state of mind, regardless of whether there is circumstantial evidence on that issue. *Crawford v. United States*, 212 U.S. 183, 202, 205 (1909); *Krogmann v. United States*, 225 F.2d 220, 229 (6th Cir. 1955). Similarly, upon cross-examination, a defendant would be compelled to answer questions on his state of mind.

\*\*\* In addition, in a criminal case, the adverse party seeking to prove the state of mind is the Government which has available in its efforts to obtain evidence on that issue the investigatory resources of the Federal Bureau of Investigation and other governmental agencies as well as the subpoena power of the grand jury.

The cases cited by defendants (Def. Br. p. 65n.) are not apposite to the issues in this case.\* In *United States v. Fleming*, 479 F.2d 56, 57 (10th Cir. 1973), the evidence in a mail obstruction case included a pre-trial statement given by defendant as to his state of mind concerning any dereliction of duties and his trial testimony as to his intentions in throwing away certain circulars. *United States v. Curtis*, 537 F.2d 1091, 1097 (10th Cir. 1976), cert. denied, 429 U.S. 962 (1977), involved violations of the Mail Fraud Statute where intent may be inferred from what the defendant should have known. See *United States v. Mandel*, 415 F. Supp. 997, 1007 (D.Md. 1976). In *re Equity Funding Corporation of America Securities Litigation*, [1976-77 Transfer Binder] CCH Fed. Sec. L.Rep. ¶95,714 at 90,474 (C.D. Cal. 1976), did not conclude that because state of mind may be based on "inference drawn from the evidence" it was not necessary or important to inquire as to the state of mind of defendant Peat, Marwick, Mitchell & Co. Indeed, one of the items of evidence specifically described by the Court was a memorandum prepared by a Peat, Marwick employee describing the conclusion of one of the firm's partners regarding the type of treatment the accounting firm had received from an Equity Funding corporation. In *Rolf v. Blyth, Eastman Dillon & Co.*, 570 F.2d 38, 47 (2d Cir. 1978), the Court stated that knowing or intentional misconduct could be established by proof of conduct which represents "an extreme departure from the standards of

\* More to the point on the issue of proof of state of mind is this Court's consideration in *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962) of the difficulty in plaintiff's establishing motive and intent where the proof of such matters is largely in the hands of the alleged wrongdoers. *Id.* at 473. On the issue of the purpose of the conspiracy alleged in *Poller*, this Court referred to the deposition testimony of CBS Vice President Salant as to his opinion of what would happen if CBS or NBC abandoned a UHF station. *Id.* at 472.

ordinary care"—a standard which defendants herein would obviously contend was inadequate to establish their state of mind.

Similarly, it seems unlikely that defendants are arguing for the application of the *Weitzman v. Stein*, 436 F.Supp. 895, 903 (S.D.N.Y. 1977) approach that the failure to disclose a transaction "is itself highly persuasive evidence of the existence of defendants' deliberate intent . . .". In that event, the failure to include in the broadcast any reference to the Donovan statements, Franklin's second filmed interview, the statements of many soldiers regarding Herbert's concern for the treatment of the Vietnamese, and the balance due on the hotel bill (Pl. Br. pp. 9-17) may well be treated as "highly persuasive" evidence of defendants' intent to present on the program a picture of Herbert contrary to that known to defendants from their investigation. In fact, defendants have attacked such a view as an unsupported novel theory of "libel by omission" (Def Br. pp. 9-10 footnote \*). While defendants' position is wrong,\* it reflects their fundamental approach to preclude both direct proof of a reporter's state of mind and possible circumstantial evidence of that state of mind.\*\*

While ignoring the impact of the editorial judgment privilege on the *Sullivan* plaintiff's ability to establish ac-

\* See e.g.: *Goldwater v. Ginzburg*, 414 F.2d 324, 329 (2d Cir. 1969), cert. denied, 396 U.S. 1049 (1970); *Varnish v. Best Medium Publishing Co., Inc.*, 405 F.2d 608, 611 (2d Cir. 1968), cert. denied, 394 U.S. 987 (1969).

\*\* The privilege created by the Court of Appeals may well have removed the entire area of editorial process from judicial inquiry. Not only questions posed directly to defendants, but all forms of possible evidence (whether testimonial or documentary) covering the entire period from the gathering of the raw data to the broadcast of the finished product may now have become immune from the defamed plaintiff's efforts to gather and present clear and convincing proof of actual malice. (See Pl. Br. pp. 33-35)

tual malice, the defendants' brief totally exaggerates the, at best, speculative claim that discovery bearing upon a reporter's views of the truth or falsity of specific matters related to the materials ultimately published threatens the robust debate contemplated by the First Amendment. In *Zurcher v. The Stanford Daily*, supra, this Court was faced with the contention that a search of the offices of a third-party newspaper under a search warrant would seriously threaten the ability of the press to gather, analyze and disseminate news because (1) there will be physical disruption, (2) confidential sources will dry up, (3) reporters will be deterred from recording and preserving their recollections for future use, (4) "internal editorial deliberations" will be disclosed and (5) self-censorship will result in order to conceal the press' possession of information. 56 L.Ed. 2d at 540. Mr. Justice White, for the majority, rejected the press' predictions of dire consequences and found:

. . . Properly administered, the preconditions for a warrant—probable cause, specificity with respect to the place to be searched and the things to be seized, and overall reasonableness—should afford sufficient protection against the harms that are assertedly threatened by warrants for searching newspaper offices.

There is no reason to believe, for example, that magistrates cannot guard against searches of the type, scope, and intrusiveness that would actually interfere with the timely publication of a newspaper. Nor, if the requirements of specificity and reasonableness are properly applied, policed, and observed, will there be any occasion or opportunity for officers to rummage at large in newspaper files or to intrude into or to deter normal editorial and publication decisions. The

warrant issued in this case authorized nothing of this sort. Nor are we convinced, anymore than we were in *Branzburg v. Hayes*, 408 US 665, 33 L Ed 2d 626, 92 S Ct. 2646 (1972), that confidential sources will disappear and that the press will suppress news because of fears of warranted searches. Whatever incremental effect there may be in this regard if search warrants, as well as subpoenas, are permissible in proper circumstances, it does not make a constitutional difference in our judgment.

(56 L.Ed. 2d at 541-542)

The *Zurcher* analysis demonstrates the fundamental error reflected in the conclusion of the Court of Appeals that the disputed discovery sought in this defamation case would have an incremental chilling effect of constitutional dimension. The absence of any such effect in this case is even more obvious than in *Zurcher*: (1) the discovery order of the District Court was issued after notice to defendants that such discovery was being sought, (2) defendants had an opportunity to and did, in fact, extensively argue to the District Court that the discovery should not be ordered, (3) the discovery sought, involving answers to particular questions, could not have been more specific,\* (4) the disputed questions were directly related to and arose from specific activities of defendants conducted in

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\*The significance of this type of specificity was noted in Mr. Justice Stewart's dissent:

A search warrant allows police officers to ransack the files of a newspaper, reading each and every document until they have found the one named in the warrant, while a subpoena would permit the newspaper itself to produce only the specific documents requested.

(56 L.Ed. 2d at 546)

connection with the preparation and presentation of a particular program.\* The Court of Appeals finding of an unconstitutional chill rests upon abstractions in conflict with the decisions of this Court.

## CONCLUSION

For all of the reasons set forth here and in plaintiff's original brief, it is respectfully urged that the judgment of the Court of Appeals for the Second Circuit be reversed and the Order entered by the District Court be reinstated in its entirety.

Respectfully submitted,

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\*The answers sought by the disputed questions are clearly sufficiently relevant to the issue of actual malice to satisfy a probable cause requirement under a search warrant. *Cf. Zurcher*, 56 L.Ed. at 542. More important, defendants had a full opportunity to convince the District Court before discovery was ordered that the questions were not relevant. In fact, defendants did make that contention and Judge Haight correctly rejected it. *See pp. 64a, 65a.*

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# In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1105

ANTHONY HERBERT,  
*Petitioner,*

vs.

BARRY LANDO, MIKE WALLACE AND CBS INC.,  
*Respondents.*

ON [REDACTED] A WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

**BRIEF OF THE NEW YORK TIMES CO., THE  
MIAMI HERALD PUBLISHING CO., THE WASHING-  
TON POST COMPANY, NATIONAL BROADCASTING  
COMPANY, INC., THE TIMES MIRROR COMPANY,  
PHILADELPHIA NEWSPAPERS, INC., MINNEAP-  
OLIS STAR AND TRIBUNE CO., DES MOINES  
REGISTER AND TRIBUNE CO., CHICAGO SUN  
TIMES, THE COURIER-JOURNAL AND LOUIS-  
VILLE TIMES CO., DOW JONES & COMPANY, INC.,  
GLOBE NEWSPAPERS COMPANY, THE BERGEN  
EVENING RECORD CORP., INDIANAPOLIS  
NEWSPAPERS, INC., AMERICAN SOCIETY OF  
NEWSPAPER EDITORS, RADIO TELEVISION  
NEWS DIRECTORS ASSOCIATION, NATIONAL AS-  
SOCIATION OF BROADCASTERS, AND REPORT-  
ERS COMMITTEE FOR FREEDOM OF THE PRESS,  
AMICI CURIAE, IN SUPPORT OF AFFIRMANCE**

DAN PAUL

PARKER D. THOMSON

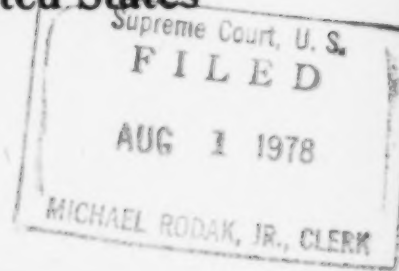
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## In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1105

ANTHONY HERBERT,  
*Petitioner,*

vs.

BARRY LANDO, MIKE WALLACE AND CBS INC.,  
*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

**BRIEF OF THE NEW YORK TIMES CO., THE MIAMI HERALD PUBLISHING CO., THE WASHINGTON POST COMPANY, NATIONAL BROADCASTING COMPANY, INC., THE TIMES MIRROR COMPANY, PHILADELPHIA NEWSPAPERS, INC., MINNEAPOLIS STAR AND TRIBUNE CO., DES MOINES REGISTER AND TRIBUNE CO., CHICAGO SUN TIMES, THE COURIER-JOURNAL AND LOUISVILLE TIMES CO., DOW JONES & COMPANY, INC., GLOBE NEWSPAPERS COMPANY, THE BERGEN EVENING RECORD CORP., INDIANAPOLIS NEWSPAPERS, INC., AMERICAN SOCIETY OF NEWSPAPER EDITORS, RADIO TELEVISION NEWS DIRECTORS ASSOCIATION, NATIONAL ASSOCIATION OF BROADCASTERS, AND REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, AMICI CURIAE, IN SUPPORT OF AFFIRMANCE**

### **INTRODUCTION AND INTEREST OF THE AMICI**

The amici curiae or their members are publishers, broadcasters, and editors.

The Miami Herald Publishing Company, a division of Knight-Ridder Newspapers, Inc., publishes The Miami Herald (circulation 404,101).

The New York Times Company publishes The New York Times (circulation 850,000; Sunday 1,400,000).

The Washington Post Company and its subsidiaries publish The Washington Post (circulation 561,640), The Trenton Times (circulation 74,000), The Everett (Washington) Herald (circulation 52,000) and Newsweek (weekly circulation 2,900,000) and own and operate four television stations.

National Broadcasting Company, Inc. operates national television and radio networks, and owns and operates television and radio stations.

Times Mirror Company publishes the Los Angeles Times (circulation 1,006,387).

The Courier-Journal and Louisville Times Company publishes The Courier-Journal (circulation 208,150), The Louisville Times (circulation 161,631), and The Courier-Journal & Times (Sunday circulation 345,052).

Des Moines Register and Tribune Company publishes The Des Moines Register (circulation 224,094), Des Moines Sunday Register (circulation 425,161), Des Moines Tribune (circulation 91,736), and the Jackson (Tenn.) Sun (circulation 31,315).

Minneapolis Star and Tribune Company publishes The Minneapolis Star (circulation 235,361), Minneapolis Tribune (circulation 224,412), and Minneapolis (Sunday) Tribune (circulation 610,408).

Philadelphia Newspapers, Inc. publishes The Philadelphia Inquirer (circulation 421,627) and the Philadelphia Daily News (circulation 220,000).

The Chicago Sun Times (circulation 611,135) is published by Field Enterprises, Inc.

Indianapolis Newspapers, Inc. publishes The Indiana Star (circulation 226,195) and The Indiana News (circulation 158,009).

The Bergen Evening Record Corporation publishes The Record (circulation 155,000) and The Sunday Record (circulation 202,000).

Dow Jones & Company, Inc. publishes The Wall Street Journal (circulation 1,541,821), Barron's National Business & Financial Weekly (circulation 215,817), and through its Ottaway subsidiary, nineteen daily newspapers (circulation 460,000), and owns and operates national and international news services.

Globe Newspaper Company publishes the Boston Globe (circulation 306,114), the Boston Evening Globe (circulation 160,569) and the Boston Sunday Globe (circulation 660,428).

The American Society of Newspaper Editors is a nationwide, professional organization of more than 800 persons holding positions as directing editors of daily newspapers throughout the United States. The purposes of the Society, which was founded more than fifty years ago, include the maintenance of "the dignity and rights of the profession" (ASNE Constitution, Preamble), and the ongoing responsibility to improve the manner in which the journalism profession carries out its responsibilities in providing an unfettered and effective press in the service of the American people.

Radio Television News Directors Association includes approximately 1500 members who are active in the supervision, gathering, reporting, and editing of news and other

information of public affairs broadcast throughout the nation.

The National Association of Broadcasters is a non-profit association of radio and television broadcast stations and networks. Its membership includes 2607 AM stations, 1981 FM stations, 557 television stations, and the major nationwide commercial broadcast networks.

The Reporters Committee for Freedom of the Press is a non-profit unincorporated legal defense and research fund devoted to protection of the First Amendment and Freedom of Information rights of working press personnel of all media.

The amici curiae regularly face the threat of libel litigation and have appeared before this Court in the landmark First Amendment controversies which govern the resolution of the issues in this action, *New York Times v. Sullivan*, 376 U.S. 254 (1964) ("Sullivan"); *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973) ("CBS"); and *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) ("Tornillo"). All amici believe the enormous litigation costs generated by the unlimited discovery authorized by the District Court in this case impose a "fundamental chill" on exercise of the First Amendment freedom of the press. All amici submit such unlimited discovery is a dangerous governmental intrusion into all aspects of the editorial process, particularly where as here investigative reporting of national policy issues—a process lying at the core of the protection extended by the First Amendment—is involved. Use of judicial compulsion to expose all aspects of the editorial process undermines *Tornillo* and fractures the protection required by *Sullivan*; it is a direct attack on the interests of all amici. Amici believe there is no basis for the conclusion of the District Court, 73 F.R.D. 387 (S.D.

N.Y. 1977), that the discovery rules of the Federal Rules of Civil Procedure may be applied without regard to First Amendment interests. Amici believe the rejection of this conclusion by the Court of Appeals, 568 F.2d 974 (2d Cir. 1977), should be affirmed.

## STATEMENT OF THE CASE

### The Background

Petitioner Colonel Anthony Herbert became a central figure in a controversy of both national and international significance when he charged his superior officers with ignoring his reports of war crimes committed by United States forces in Vietnam. An Army investigation followed and dismissed these charges. All media reported the controversy. The issue of war crimes became the focal point of much debate throughout the world.

Colonel Herbert, who had been relieved of his command in Vietnam for "inefficiency" nearly two years prior to filing his charges with the Army's Criminal Investigation Division, made himself the focal point of the debate. He thus was conceded to be a "public figure" (73 F.R.D. at 391), as that term is explicated in *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), and subsequent decisions of this Court applying *Sullivan* to "public figures". More than that, he was an important government official who precipitated one of the most significant national policy debates of our time.

Colonel Herbert appeared on television to tell his story; he was favorably interviewed and reviewed in *The New York Times* and in *Life Magazine*. He wrote, in collaboration with a New York Times reporter, the book *SOLDIER* which gave his side of the controversy.

As the debate developed, a question arose as to the veracity and reliability of Colonel Herbert. On February 4, 1973 CBS broadcast a segment of "60 Minutes" entitled "The Selling of Colonel Herbert". Much of the program was directed to an examination of the factual assertions of Herbert, his protagonists and his antagonists. The program also seriously questioned the validity of Herbert's claim that the army regularly covered up war crimes and called into question Herbert's assertion of the occurrence of a cover-up of war crimes. Mike Wallace was the principal program correspondent; Barry Lando was its producer. The segment was the product of an extensive investigation of Herbert's charges by Lando and Wallace. This extensive investigation was in turn related by Lando in "The Herbert Affair," which appeared in the May, 1973 edition of *Atlantic Monthly*.

### **The Discovery**

The CBS telecast and the subsequent article were the basis of Herbert's libel action. By agreement of counsel, Herbert was to complete discovery of Lando, Wallace, and CBS before defendants' discovery of Herbert would commence. Herbert's discovery was massive. Lando's deposition alone, extending from August 1, 1974 through September 26, 1975, ranged over some 26 volumes running to approximately 3,000 pages and 240 exhibits. Thousands of pages of documents were produced; screenings of the segments and filmed interviews were arranged.

Herbert inquired into Lando's knowledge, discussions, interviews, sources, and many other areas of the investigative and production process. Defendants provided all requested material, incurring tremendous expense and sacrificing countless man-hours. This federal diversity action, with the attendant power to utilize the Federal

Rules of Civil Procedure to coerce virtually unlimited discovery, served to immobilize one of CBS' leading investigative news teams for more than a year.

Defendants declined to provide information only when Herbert's discovery turned from the broadcast to the underlying editorial judgments in questions summarized by the Court of Appeals as concerning:

1. Lando's conclusions during his research and investigations regarding people or leads to be pursued, or not to be pursued, in connection with the "60 Minutes" segment and the *Atlantic Monthly* article;
2. Lando's conclusions about facts imparted by interviewees and his state of mind with respect to the veracity of persons interviewed;
3. The basis for conclusions where Lando testified that he did reach a conclusion concerning the veracity of persons, information or events;
4. Conversations between Lando and Wallace about matter to be included or excluded from the broadcast publication; and
5. Lando's intentions as manifested by his decision to include or exclude certain material.

568 F.2d at 983.

### **The District Court**

The District Court issued a sweeping opinion which ruled First Amendment interests irrelevant to defining the scope of permissible discovery in a *Sullivan* libel action. The court ordered the defendants to respond to virtually all of Herbert's controverted discovery requests, having concluded the heavy burden placed upon *Sullivan* plaintiffs required a liberal reading of the discovery rules. The

District Court dismissed *CBS* and *Tornillo*, which mandate virtually absolute protection to the editorial process of the press, as irrelevant: "hav[ing] nothing to do with the proper boundaries of pre-trial discovery in a defamation suit . . . ." 73 F.R.D. at 396.

### The Court of Appeals

The Court of Appeals reversed the District Court, 2-1, with Chief Judge Kaufman and Judge Oakes comprising the majority and concluding First Amendment interests must be given effect in determining the appropriate scope of the discovery process. Both judges recognized a First Amendment right to protection against forced disclosure of a journalist's exercise of editorial control and judgment. 568 F.2d at 975.

Judge Kaufman viewed this Court's decisions as "repeatedly recogniz[ing] the essentially tripartite aspect of the press's work and function in: (1) acquiring information, (2) 'processing' that information, and (3) disseminating that information." 568 F.2d at 976. This case dealt with the second function, the editorial process. Citing *Tornillo* and *CBS*, he observed:

The media is not a conduit which receives information and, senselessly, spews it forth. The active exercise of human judgment must transform the raw data of reportage into a finished product. The Supreme Court cases which grant protection to the editor so shaping the news are unequivocal in their terms.

\* \* \*

The unambiguous wisdom of *Tornillo* and *CBS* is that we must encourage, and protect against encroachment, full and candid discussion within the newsroom itself.

568 F.2d at 978-79.

Noting *Sullivan* stands for the principle that defamation actions must not be allowed to interfere with the "robust and uninhibited debate of public issues", Judge Kaufman concluded:

. . . we must permit only those [discovery] procedures in libel actions which least conflict with the principle that debate on public issues should be robust and uninhibited. If we were to allow selective disclosure of how a journalist formulated his judgments on what to print or not to print, we would be condoning judicial review of the editor's thought processes. Such an inquiry, which on its face would be virtually boundless, endangers a constitutionally protected realm, and unquestionably puts a freeze on the free interchange of ideas within the newsroom.

568 F.2d at 980.

Since "the *ratio decidendi*" of *Sullivan* "is the concern that the exercise of editorial judgment would be chilled" (568 F.2d at 980) and the "lifeblood of the editorial process is human judgment" (568 F.2d at 984), Herbert's questions, which sought to make a decision-by-decision analysis of the process of reaching that judgment, could not be tolerated under the First Amendment.

Judge Oakes agreed limits must be set in *Sullivan* cases "on the untrammelled, roving discovery that has become so prevalent in other types of litigation in today's legal world." 568 F.2d at 985. He noted the Federal Rules specifically limit discovery which would oppress or burden a deponent (Rule 26(c)) or would compel discovery of privileged material (Rule 26(b)(1)). After considering the various alternatives, he decided the press clause of the First Amendment required "the conclusion that the editorial process is subject to constitutional privilege

and that actual malice must be proved by evidence other than that obtained through compelled disclosure of matters at the heart of the editorial process." 568 F.2d at 992. Noting actual malice which could be proved in any number of ways without intruding into this process, he concluded the First Amendment must limit discovery:

. . . permitting compelled discovery of the editorial process would indubitably increase the level of chilling effect in a way ostensibly not contemplated by *Sullivan*. Thus, it is one thing to tell the press that its end product is subject to the actual malice standard and that a plaintiff is entitled to prove actual malice; it is quite another to say that the editorial process which produced the end product in question is itself discoverable. Such an inquiry chills not simply the material published but the relationship among editors. Ideas expressed in conversations, memoranda, handwritten notes and the like, if discoverable, would in the future "likely" lead to a more muted, less vigorous and creative give-and-take in the editorial room.

468 F.2d at 993-4.

Finally, Judge Oakes set out the scope of required protection. While case-by-case development of the "editorial process concept" would be required, the starting point had already been identified by Chief Justice Burger in *Tornillo*:

[T]he choice of material to go into the broadcast, "the decisions made" on the duration and "content" of the broadcast, and "treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment," 418 U.S. at 285, thus, *Tornillo* mandates that the mental processes of the press regarding "choice of material," duration,

and "content" of the broadcast are to be protected from scrutiny.

*Id.* at 995.

The Court of Appeals' majority thus held the press clause proscribed the compelled disclosure of the editorial process in a *Sullivan* libel action.

### SUMMARY OF ARGUMENT

This case poses the issue of whether compelled discovery into the editorial process in a *Sullivan* libel action is consistent with *Sullivan*'s protection of the uninhibited, robust, and wide open discussion of public affairs and the protection of the editorial process presaged in *CBS* and mandated in *Tornillo*.

*Sullivan* speaks to society's basic interest in robust debate on public controversies. To protect the press against libel actions by public officials, *Sullivan* erected the "actual malice" standard. Recognizing that it is not only individuals in government whose activities merit public attention, this Court subsequently extended the "actual malice" standard to "public figures". To underscore the importance of this protection, this Court required the libel plaintiff in a *Sullivan* case to meet a burden of proof of "clear and convincing evidence". Lower courts, elaborating on this Court's initial procedural protection, have made summary judgments the "preferred rule" in *Sullivan* actions. By contrast, the District Court here effectively shifts the "burdens" of litigation to the defendant, ignoring the constitutional protection announced in *Sullivan*. In reversing, the Court of Appeals construed the discovery rules to accommodate First Amendment interests.

As the Court of Appeals recognized, compelled discovery of the editorial process in a *Sullivan* case must be barred as an abridgement of fundamental First Amendment protection, since:

(1) Untrammelled discovery into the editorial process with its enormous pre-trial litigation costs, impermissibly burdens the exercise of First Amendment rights. Such discovery will inevitably dampen debate, because editors can be expected to allocate resources to the reporting of news less likely to incur such financial burdens. As a result, the *Sullivan* rule will chill rather than foster debate and discourage the exercise of the press' "checking function."

(2) Compelled discovery permits disgruntled public figures to convert *Sullivan* libel actions into retaliatory actions against the press, thereby effectively reviving the threat of "seditious libel" *Sullivan* sought to extinguish. The public figure's capacity for self-help minimizes his general need for a libel action to preserve reputation. Yet with wide ranging discovery available, a trial judge will normally be unwilling to dispose of a complaint by summary judgment until the official has completed discovery.

(3) Compelled disclosure of the editorial process directly chills and hamstring the press' ability to perform its First Amendment function by exposing complex and sensitive deliberations to public scrutiny. Since editorial decisionmaking depends on candor and objectivity, as well as the protection of sources and concealment of targets of investigative reporting, exposure must induce self-censorship. Furthermore, cases would be decided on the basis of a jury's evaluation of the precise kinds of editorial judgments and statements of opinion protected by *Tornillo* and other decisions of this Court.

In contrast to the damaging effects on First Amendment interests of permitting compelled discovery into editorial decisionmaking, the impact on public figure libel plaintiffs of denying such discovery is slight. This Court therefore should affirm the judgment of the Court of Appeals recognizing, in a *Sullivan* action, an absolute privilege from compelled discovery into the editorial process.

## ARGUMENT

### I. Under the First Amendment Defendants may not be Compelled to Disclose Their Editorial Processes in a *Sullivan* Rule Libel Action.

#### A. The First Amendment Preserves The Free Press As one of the "Great Bulwarks of Liberty".

Freedom of the press is protected by the press clause<sup>1</sup> of the First Amendment. As James Madison's original draft of the First Amendment shows, that clause secures the press as a separate protector of liberty and is not merely a redundancy to the speech clause:

"The people shall not be deprived nor abridged of their right to speak, to write, or to publish their sentiments, and freedom of the press, as one of the great bulwarks of liberty, shall be inviolable." I *Annals of Cong.* 451 (1789),

quoted in *First National Bank of Boston v. Bellotti*, 98 S.Ct. 1407, 1428, fn. 4 (Burger, C.J., concurring) (emphasis sup-

1. "Congress shall make no law . . . abridging the freedom . . . of the press. . ."

plied); see also LEVY, JEFFERSON AND CIVIL LIBERTIES: THE DARKER SIDE 49 (1963).<sup>2</sup>

As Justice Stewart recently observed:

That the First Amendment speaks separately of freedom of speech and freedom of the press is not constitutional accident but an acknowledgment of the critical role played by the press in American society. The Constitution requires sensitivity to that role, and to the special needs of the press in performing it effectively.

*Houchins v. K.Q.E.D., Inc.*, 46 U.S.L.W. 4830, 4834. (June 26, 1978) (Stewart, J., concurring).<sup>3</sup>

Recent scholarly debate<sup>4</sup> supports the conclusion the press is a separate constitutional protector of liberty.

2. The final version of the press clause reflects only stylistic, not substantive, changes from Madison's original draft. See *First National Bank of Boston v. Bellotti*, *supra*, 98 S.Ct. at 1428, fn. 4 (Burger, C.J., concurring).

3. Cf. *First National Bank of Boston v. Bellotti*, *supra*, 98 S.Ct. at 1428 (Burger, C.J., concurring):

"To conclude that the Framers did not intend to limit the freedom of the press to one select group is not necessarily to suggest that the Press Clause is redundant. The Speech Clause standing alone may be viewed as a protection of the liberty to express ideas and beliefs,<sup>4</sup> while the Press Clause focuses specifically on the liberty to disseminate expression broadly . . ."

4. Professor Thomas Emerson has observed "[H]istory is seldom simple or forthright. . . . It is by no means clear exactly what the colonists had in mind, or just what they expected from the guarantee of freedom of speech, press assembly, and petition." Emerson, *Colonial Intentions and Current Realities of the First Amendment*, 125 UNIVERSITY OF PENN. L. REVIEW 737 (1977). Other commentators agree both that the history is obscure and the expressions of "Freedom of the Press" and "Freedom of Speech" have often been used interchangeably. LEVY, *LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY* (1963) 1974-77; LEVY, *FREEDOM OF THE PRESS FROM ZENGER TO JEFFERSON* (1966); RUTLAND, *THE BIRTH OF THE BILL OF RIGHTS* (1955). Nevertheless, commencing with Mr. Justice

(Continued on following page)

Press freedom was not created to confer special privileges upon an "institutional" press or elevate businesses which publish to a "preferred status". Rather the press clause was intended to protect a set of constitutional processes, irrespective of who performs them. These processes are the right to gather news, information, and opinion; to edit the material gathered as seen fit; to publish the edited material; and to disseminate widely the product. Whether these functions are carried out by CBS, *The New York Times*, *The Greenbelt* (Md.) *News Review*,<sup>5</sup> the *Ocala* (Fla.) *Star Banner*,<sup>6</sup> or "the lonely pamphleteer,"<sup>7</sup> these processes are protected as a separate "great bulwark of liberty."

#### Footnote continued—

Stewart's speech at Yale Law School on the occasion of its sesqui-centennial celebration, Stewart, *Or of the Press*, 26 HASTINGS L.J. 631 (1975) (arguing the press clause is a structural provision of the Constitution, according the press special protection), a scholarly debate has resulted in a general consensus the press and speech clauses reflect disparate foci: Nimmer, *Introduction—Is Freedom of the Press a Redundancy? What does it add to freedom of speech?*, 26 HASTINGS L.J. 639 (1975); Lange, *The Speech and Press Clauses*, 23 U.C.L.A. L. REV. 77 (1975) (arguing the clauses should be read as having a common meaning); Bezanson, *The New Free Press Guarantee*, 63 VIRGINIA L. REV. 731 (1977) (arguing press clause should be construed similarly to the religion clauses in the First Amendment so as to mandate a wall of separation between press and state); Van Alstyne, *The Hazards to the Press of Claiming a Preferred Position*, 28 HASTINGS L.J. 761 (1977) (contending that extension to the press of special rights may cause the judiciary to impose on it concomitant duties converting it into a "public utility"). See also *Symposium First Amendment and the Right to Know: Emerson, Legal Foundation of the Right to Know*, 1976 WASH. UNIV. L.Q. 1; Gellhorn, *The Right to Know: First Amendment Overbreadth?* *Id.* at 25; Goodale, *Legal Pitfalls In The Right to Know*, *Id.* at 29.

5. See *Greenbelt Cooperative Publishing Association, Inc. v. Bresler*, 398 U.S. 6 (1970) (libel action by public figure against local weekly newspaper).

6. See *Ocala Star-Banner Co. v. Damron*, 401 U.S. 295 (1971) (libel action by a public official against local daily newspaper).

7. *First National Bank of Boston v. Bellotti*, *supra* at 1429 (Burger, C.J., concurring).

This does not mean the press and speech clauses have totally disparate purposes. Both clauses protect expression. Newspapers and broadcasters editorialize and editorial judgments inherently involve expression of values. When newspapers and broadcasters engage in investigative reporting, the reporting, as here, normally results in expression of a point of view.

Nevertheless, the sweep of the press clause is broader than the speech clause, reaching, as Judge Kaufman observed below, not only expression, but all processes from information gathering to dissemination of the "processed" result. And this broad sweep carries out the Framers' concept of the basic function of the press as a check on governmental abuse.<sup>8</sup> This "checking value," furthered by

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8. The exact historical purpose of this one "great bulwark of liberty" cannot be determined. Professor Vincent Blasi, in a recent exhaustive study, has shown that one central aim of the Framers was to preserve the right of individuals and the press to publish opinions critical of governmental policy and to seek to expose governmental corruption and abuse. Greatly influenced by Cato, Father of Candor, and Junius, the Framers thus saw protection of news processes as an institutional check on government. Blasi states the "checking value" is the value that "free speech, a free press, and free assembly can serve in checking the abuse of power by public officials." Blasi demonstrates the Framers expected both free speech and freedom of the press to perform this function. Once again, only the focus on the processes involved differentiate the clauses. Blasi *The Checking Value Of The First Amendment*, AMERICAN BAR FOUNDATION RESEARCH JOURNAL 521, 527 (1977). See also BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 36 (1967); CHAFEE, *FREE SPEECH IN THE UNITED STATES* 21 (1969). Shortly after the First Amendment was adopted its content was considered to mean "free government depends for its very existence and security on freedom of political discourse." LEVY, *FREEDOM OF THE PRESS FROM ZENGER TO JEFFERSON*, *supra* at LXXVI. MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* (1965); Meiklejohn, *The First Amendment Is An Absolute*, 1961 SUP. CT. REV. 246; Meiklejohn, *What Does the First Amendment Mean?* 20 U. CHI. L. REV. 461 (1952-53); MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948); Brennan, *The Supreme Court and the Meiklejohn In-* (Continued on following page)

reporting of the type here involved, requires a press right to freely investigate, evaluate, and criticize government policy to expose government corruption and abuse. This in turn necessitates a press right to investigate and evaluate those, like Herbert, who publicly charge government with wrongdoing. This Court has repeatedly recognized this "checking value" of the First Amendment's press protection. *Near v. Minnesota*, 283 U.S. 697, 719-20 (1931); *Mills v. Alabama*, 384 U.S. 214, 218-19 (1966); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975); *Nebraska Press Assoc. v. Stuart*, 427 U.S. 539 (1976).

To buttress the "liberty" guaranteed by the press clause, private individuals must be allocated the right to decide what information to publish as "newsworthy" and what information is relevant to decisionmaking. The exercise of this power to determine the form and substance of expression is the editorial process. As life and government both become increasingly complex and the need of individuals for information increases at a geometric rate, the time individuals possess to digest news and opinion decreases. The balancing implicit in editorial decisions becomes crucial, and the freedom to pursue one's self-

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Footnote continued—

*terpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965); Kalven, *The New York Times Case: A Note On The Central Meaning Of The First Amendment*, 1964 SUP. CT. REV. 191 (1964). Professor Blasi notes a number of significant differences between the "checking value" and the Meiklejohn theory. Blasi, *supra*, 558-64. The "checking value" is less absolutist, does not claim to be exhaustive of other First Amendment interests, and "focuses on the particular problem of misconduct by government officials." *Id.* at 558. Also it was clearly in the minds of the Framers of the First Amendment at the time of its drafting and ratification. The Meiklejohn theory would protect all expression useful to self-government, but not private expression. The material constituting the predicate of this libel suit would be protected under either theory.

interests in all areas of life depends on information."<sup>9</sup> "... [P]eople will perceive their own best interests if only they are well enough informed. ..." *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976). Protection of the editorial process, controlling the flow of information, its form and emphasis, is then, the cornerstone of First Amendment freedom, for government may not be allowed to dictate to the people what they should or should not know, or what they can or cannot express.<sup>10</sup> As *CBS* and *Tornillo* held the First Amendment denies government this power.

#### **B. This Court Has Consistently Upheld the First Amendment's Protection of Press Processes.**

The Framers' intent that the First Amendment should protect press processes so as to guarantee liberty has evolved, with the guidance of this Court, from the press clause's general concepts to modern conceptions appropriate to our complex society. Winter, *The Seedlings For the Forest*, 83 YALE L.J. 1730 (1974) (critical review of BERGER, EXECUTIVE PRIVILEGE); DWORKIN, TAKING RIGHTS SERIOUSLY 134-36 (1977); Emerson, *Colonial Intentions*, . . . , *supra*; Wellington, *Notes on Adjudication*, 83 YALE L.J. 221 (1973). The extent of this protection has increased from its least

9. That the interest in having information to make free choices sweeps more broadly than the interest in self-government is made clear both in the "commercial speech" cases, and in the "privacy" decisions (e.g. *Carey v. Population Services International*, 431 U.S. 678 (1977), striking down statutory prohibition on advertisements for contraceptives). Individual autonomy is what the First Amendment is more expansively perceived to protect. *Whitney v. California*, 274 U.S. 357 (1927); *Blasi*, *supra* at 544-48.

10. Such governmental paternalism was rejected by the First Amendment. *Linmark Assoc. v. Willingboro*, 431 U.S. 85, 97 (1977); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, *supra*; BICKEL, THE MORALITY OF CONSENT 80-81 (1975).

sensitive aspect,<sup>11</sup> gathering of information, to its most, the editorial process and publication and dissemination of the published product. The latter have received virtually unrestricted protection.

The protections for the editorial process were fashioned in *Tornillo* and *CBS*.<sup>12</sup> So too with the right to publish free of prior restraint and unjustifiable subsequent punishment. *Nebraska Press Assoc. v. Stuart*, *supra*.<sup>13</sup>

This case will determine whether the absolute protection heretofore accorded the editorial process by this Court will continue. We know that subject only to the most narrow exceptions,<sup>14</sup> government may not tell editors,

11. Although newsgathering has been accorded the least protection of the various press functions, this Court has recognized the need to afford it some degree of protection. *Branzburg v. Hayes*, 408 U.S. 665 (1972). See also *Pell v. Procunier*, 417 U.S. 817 (1974); *Houchins v. K.Q.E.D.*, *supra*; *CBS Inc. v. Young*, 522 F.2d 234 (6th Cir. 1975); *Bursey v. U.S.*, 466 F.2d 1059 (9th Cir. 1972); Loveland, *Newsgathering: Second-Class Right Among First Amendment Freedoms*, 53 TEX. L. REV. 1440 (1974-75); Comment, *The Right of the Press to Gather Information After Branzburg and Pell*, 124 UNIV. OF PENN. L. REV. 166 (1975); Note, *Broadcasters' Newsgathering Rights Under The First Amendment: Garrett v. Estelle*, 63 IOWA L. REV. 724 (1978). There is a considerable body of law granting qualified protection, particularly against subpoenas. See Goodale, *Branzburg v. Hayes and the Developing Qualified Privilege for Newsmen*, 26 HASTINGS L.J. 709 (1975). Many of the cases are collected in Goodale, *Subpoenas*, COMMUNICATIONS LAW 1977, 217 (P.L.I.).

12. See *Abrams, In Defense of Tornillo*, 86 YALE L.J. 361 (1976); Cf. SCHMIDT, FREEDOM OF THE PRESS VS. PUBLIC ACCESS (1976).

13. See also *Near v. Minnesota*, *supra*; *Landmark Communications, Inc. v. Commonwealth of Virginia*, 98 S.Ct. 1535 (1978); *Pennekamp v. Florida*, 328 U.S. 331 (1946); *Craig v. Harney*, 331 U.S. 367 (1946); *Wood v. Georgia*, 370 U.S. 375 (1962). An unrestricted right to disseminate published material is also guaranteed. *Grosjean v. American Press Co.*, 297 U.S. 233 (1936); *Hannigan v. Esquire*, 327 U.S. 146 (1946).

14. Exceptions exist for those cases in which national security interests are immediately, seriously, and irreparably threatened, *New York Times v. United States*, 403 U.S. 713 (1971); material that is obscene, *Miller v. California*, 413 U.S. 15 (1973); or material which invades privacy, *Cox Broadcasting Co. v. Cohn*, *supra*, or is libelous, *Sullivan*.

before or after the fact, what they must publish or what they may not publish. The question is posed whether this virtually absolute protection of the editorial process prohibits court orders compelling unlimited discovery into that process.

**C. Compelled Discovery Into the Editorial Process in a *Sullivan* Libel Suit is Proscribed by the Press Clause.**

In *Sullivan* this Court began the process of squaring the law of libel with the First Amendment to protect the "uninhibited, robust, and wide open debate" of public issues. To accomplish this purpose *Sullivan* established a substantive rule that a public official show "actual malice" as a predicate to a libel recovery. *Curtis Publishing Co. v. Butts*, *supra*, extended this rule to public figures.

But substantive rules were not enough to accomplish the purpose. Additional protections were also necessary, and the first of these was established by this Court, a heavy burden of proof for *Sullivan* rule libel cases—"clear and convincing evidence." *Garrison v. Louisiana*, 379 U.S. 64 (1964); *St. Amant v. Thompson*, 380 U.S. 727 (1968); *Monitor Patriot Co. v. Ray*, 401 U.S. 265 (1971). Lower courts have elaborated further protections. Thus in *Sullivan* rule libel cases, summary judgment has become the "preferred rule". *Time, Inc. v. McLaney*, 406 F.2d 565 (5th Cir.), *cert. den.*, 395 U.S. 922 (1969); *Washington Post v. Keogh*, 365 F.2d 965 (D.C. Cir. 1965), *cert. den.*, 385 U.S. 1011 (1967); *Guitar v. Westinghouse Electric Corp.*, 396 F. Supp. 1042 (S.D.N.Y. 1975). One more, and equally necessary, procedural protection was afforded by the Court of Appeals here.

Although *Sullivan's* test of knowing or reckless disregard of falsity focused on the subjective state of mind

of the libel defendant,<sup>15</sup> that test did not sanction a Star Chamber investigation of that state of mind. That sanction, if sanction there be, came from the recent extraordinary expansion of the discovery process. Discovery, wrought by the adoption of the Federal Rules of Civil Procedure in 1938 (and their subsequent amendments in 1946 and 1970),<sup>16</sup> has mushroomed in recent years. The combination of these events threatens to pervert *Sullivan's* attempt to protect "wide open" discussion of public affairs into a license for public officials to intrude into the editorial processes of the press merely by filing a libel action. If this Court is to continue to protect that kind of expression, it must do so through procedural protections adequate to the evolving need. Limitations on compelled discovery to protect the editorial process are a prime requirement, as the Court of Appeals here held.

**1. Discovery Into the Editorial Process Generates Enormous Pre-Trial Litigation Costs Which Impermissibly Burden the Press.**

The record of this case demonstrates the enormous pre-trial litigation costs a *Sullivan* plaintiff may inflict without ever obtaining a judgment on the merits and without any showing of constitutional libel. The deposition of Lando alone continued intermittently for over a year, filling 26 volumes and nearly 3,000 pages. Some

15. Of course this Court could have protected untrammelled discussion by resolving *Sullivan* along other lines. The leading commentator in the field, Professor Emerson, believes the approach taken in *Sullivan* was inconsistent with the system of freedom of expression our nation requires. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION*, 528-540 (1970).

16. See generally 4, 4A MOORE'S FEDERAL PRACTICE (1975). As Professor Moore notes, "Under the former practice at law there was no right to secure an examination of parties or witnesses before the trial solely for discovery purposes. . . ." 4 MOORE'S FEDERAL PRACTICE 719.

240 exhibits were provided. The expense of this discovery is only the "tip of the iceberg." The man-hours lost by Lando and his staff in preparing for, and providing, this discovery were perhaps even more costly to CBS. A leading investigative news team was effectively hamstrung by this discovery process. In addition, legal fees have been substantial. These staggering litigation costs have been imposed in the name of *Sullivan* despite that decision's intent to reduce the costs of "uninhibited, robust, and wide open" expression. The consequence of such costs, if permitted by this Court in the name of "liberal" discovery, can only be to chill such expression.

This case features the type of runaway discovery that has caused this Court and others to express grave concern about the continued utility of "liberal" discovery. As this Court observed in *Blue Chips Stamps v. Manor Drug Stores*, 421 U.S. 723, 741 (1975), enormous opportunity exists for "possible abuse of the liberal discovery provisions of the Federal Rules of Civil Procedure."<sup>17</sup>

Libel plaintiffs may engage in broadbased "fishing expeditions" to force settlement. See *Hickman v. Taylor*, 329 U.S. 495, 507-08 (1947); 4 MOORE'S FEDERAL PRACTICE §26.55(1); 8 WRIGHT AND MILLER, FED. PRACT. AND PROC. §2007 at 39-40 (1970). Professor Moore has noted the increased use of discovery to inflict heavy costs upon opponents, particularly where there is little cause for fear of retaliation. 4 MOORE'S FEDERAL PRACTICE §26.02(3) at 26-68

17. To the same effect, see *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Board of Culinary Workers*, 542 F.2d 1076, 1082-83 (9th Cir. 1976), cert. den., 430 U.S. 940 (1977); *Maheu v. Hughes Tool Co.*, 569 F.2d 459, 462 (9th Cir. 1978). See also Burger, *Agenda for 2000 A.D.: A Need for Systematic Anticipation*, THE POUND CONFERENCE, 70 F.R.D. 76, 95-96 (1976); Lasker, *The Court Crunch: A View From The Bench*, 6 F.R.D. 245, 249-50 (1977).

to 72 (2d ed. 1976).<sup>18</sup> Commentators agree no effective sanctions exist for discovery abuse. 4A MOORE'S FEDERAL PRACTICE §37.08 at 37-109-13; 8 WRIGHT AND MILLER, FED. PRACT. AND PROC. §2284 at 767-72.

When First Amendment interests are involved, abuse of discovery is more than a matter of concern; it is a violation of the Constitutional guarantee that exercise of First Amendment rights not be "chilled". This Court has repeatedly invalidated statutes and rules which *even tend to chill* the exercise of First Amendment rights.<sup>19</sup>

It is cruelly ironic that unlimited compelled discovery in the name of *Sullivan* and the attendant enormous pre-trial litigation costs imposed could pervert that landmark decision by actually dampening debate. One would have thought this Court in *Sullivan* itself had already barred such a result:

Would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so.

*Sullivan*, 376 U.S. at 279. (emphasis supplied)

To the same effect, see the plurality opinion in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 52-53:

18. Comment, *Tactical Use and Abuse of Depositions Under The Federal Rules*, 59 YALE L.J. 117 (1949); Speck, *The Use of Discovery in United States District Courts*, 60 YALE L.J. 1132 (1951); Godofsky, *Protection of the Press From Harassment Under Libel Laws*, 29 UNIV. MIAMI L. REV. 462, 466 (1975).

19. *Elrod v. Burns*, 427 U.S. 347, 355-73 (1976); *Buckley v. Valeo*, 424 U.S. 1, 12-59 (1976); *Kusper v. Pontikes*, 414 U.S. 51, 56-61 (1973); *Healy v. James*, 408 U.S. 169, 181-84 (1972); *Lamont v. Postmaster General*, 381 U.S. 301, 305-07 (1965); *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539, 544-50 (1963); *Talley v. California*, 362 U.S. 60, 64-65 (1960).

It is not simply the possibility of a judgment for damages that results in self-censorship. The very possibility of having to engage in litigation, an expensive and protracted process, is threat enough to cause discussion and debate to "steer far wider of the unlawful zone" thereby keeping protected discussion from public cognizance.

Lower federal courts have repeatedly recognized the need to short-circuit litigation costs and to procedurally protect the objectives of *Sullivan's* substantive rule. Summary judgment has been made the "preferred rule" in *Sullivan* cases.<sup>20</sup> The rationale was given in *Washington Post v. Keogh*, *supra*, 365 F.2d at 968:

In the First Amendment area, summary procedures are even more essential. For the stake here, if harassment succeeds, is free debate. One of the purposes of the *Times* principle, in addition to protecting persons from being cast in damages in libel suits filed by public officials, is to prevent persons from being discouraged in the full and free exercise of their First Amendment rights with respect to the conduct of their government. The threat of being put to the defense of a lawsuit brought by a popular public official may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself, especially to advocates of unpopular causes. All persons who desire to exercise their right to criticize public officials are not as well equipped financially as the *Post* to defend against a trial on the merits. Unless persons, including news-

20. *Bon Air Hotel, Inc. v. Time, Inc.*, 426 F.2d 858, 865 (5th Cir. 1970); *Time, Inc. v. McLaney*, *supra*, 406 F.2d at 566; *Wolston v. Reader's Digest Ass'n*, 429 F. Supp. 167, 179 (D.D.C. 1977); *Guitar v. Westinghouse Electric Corp.*, *supra*, 396 F. Supp. at 1053; *Grant v. Esquire, Inc.*, 367 F. Supp. 876, 881 (S.D.N.Y. 1973).

papers, desiring to exercise their First Amendment rights are assured freedom from the harassment of lawsuits, they will tend to become self-censors. And to this extent debate on public issues and the conduct of public officials will become less uninhibited, less robust, and less wide-open, for self-censorship affecting the whole public is "hardly less virulent for being privately administered."

*Keogh* was certainly correct in noting the disparity in financial ability of newspapers and broadcasters to face trial costs. Rampant discovery can place additional unacceptable costs on small newspapers and broadcasters. While the threat of enormous litigation costs may merely "chill" a decision by a large newspaper or broadcaster, these costs may threaten the continued existence of the small independent media enterprise and preclude any editorial decisions to engage in investigative reporting. In 1976 there were 7,579 weekly newspapers with an average circulation of only 5,015 and 1,512 daily newspapers with circulations under 50,000. Only 250 newspapers or 14.2% of total dailies, had circulation in excess of 50,000. AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION, *FACTS ABOUT NEWSPAPERS* (1977). This Court recently recognized society's interest in preserving diversity of media expression through limiting industry concentration by rules against "cross-ownership". *F.C.C. v. National Citizens Committee for Broadcasting, et al.*, 98 S.Ct. 2096 (1978).

Prelitigation costs and litigation costs are, of course, added to the substantial expense of investigative reporting itself. In such reporting, the decision to incur that expense carries no guarantee of success. Investigative reporting is normally a commitment to the historic function of the press to check governmental abuse. The imposition of the additional financial cost of discovery abuse on the actual

expense of that editorial commitment may alone be sufficient to prevent the commitment entirely.

The decision by the Court of Appeals below to restrict discovery to preserve First Amendment interests was hardly the first to recognize the need to protect press rights thus imperiled.<sup>21</sup> The protection accorded by the Court of Appeals here is consistent with these discovery decisions as well as this Court's "clear and convincing evidence" rule and the summary judgment decisions of lower courts.

**2. Discovery Into the Editorial Process Allows Public Figures to Convert *Sullivan* Libel Actions Into Retaliatory Vehicles Against the Press, Thereby Effectively Reviving the Threat of Seditious Libel Laws.**

*Sullivan* not only protected press commentary on public figures, it also reaffirmed this country's repudiation of seditious libel:

If neither factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct, the combination of the two elements is no less inadequate. This is the lesson to be drawn from the great controversy over the Sedition Act of 1798, 1 Stat. 596, which first crystalized a national awareness of the central meaning of the First Amendment.

376 U.S. at 273.

21. *Baker v. F. & F. Investment*, 470 F.2d 778 (2d Cir. 1972); *Carey v. Hume*, 492 F.2d 631 (D.C. Cir. 1974); *Cervantes v. Time, Inc.*, 464 F.2d 986 (8th Cir. 1972), cert. den., 409 U.S. 1125 (1973); *Gilbert v. Allied Chemical Corp.*, 411 F. Supp. 505 (E.D. Va. 1976); *Apel v. Murphy*, 70 F.R.D. 651 (D.R.I. 1976); *Apicella v. McNeil Laboratories, Inc.*, 66 F.R.D. 78 (E.D.N.Y. 1975); *Loadholtz v. Fields*, 389 F. Supp. 1299 (M.D. Fla. 1975); *Democratic National Committee v. McCord*, 356 F. Supp. 1394 (D.D.C. 1973).

The Sedition Act was a vehicle for public officials to retaliate against press criticism. *Sullivan* recognized that libel actions by public officials could be even more destructive of press freedom than such criminal libel statutes:

Plainly the Alabama law of civil libel is "a form of regulation that creates hazards to protected freedoms greater than those that attend reliance upon the criminal law".

*Id.* at 278. (citation omitted)

*Curtis Publishing Co. v. Butts*, *supra*, recognized the same consequence from public figure libel actions.

The public official figure already is capable of self-help, so his use of the libel action is often for the same destructive purpose as the criminal libel statute. As this Court observed in *Gertz v. Welch*, 418 U.S. 323, 344 (1974):

The first remedy of any victim of defamation is self-help—using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation. Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy. Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater.

More important than the likelihood that private individuals will lack effective opportunities for rebuttal, there is a compelling normative consideration underlying the distinction between public and private defamation plaintiffs. An individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs.

He runs the risk of closer public scrutiny than might otherwise be the case. And society's interest in the officers of government is not strictly limited to the formal discharge of official duties.

This case is a paradigm of the reason for the public figure rule: Herbert was able to fully present his version of this story through the use of all media. He would now use a *Sullivan* libel suit to attack the press because it responded to, and possibly refuted, his assertions.

This case demonstrates that unless abuse of discovery is eliminated, *Sullivan's* attempted control of libel suits may be obliterated. Herbert has sought to use discovery to punish the press for its presentation of a critical view of his actions. Unfortunately Herbert's efforts are not unique. *Cervantes v. Time*, *supra*; *Democratic National Committee v. McCord*, *supra*, are other examples of the threat of procedural abuse. Such tactics revive the threat once posed by the law of seditious libel and greatly undermine the "checking value" of the press.

### 3. Compelled Exposure of the Editorial Process Chills and Hamstrings the Press.

Editorial decisions are made in a complex assimilative process which seeks to identify and continuously refine "newsworthy" material, information, and opinion relevant to the public interest. Scarcity of press resources and audience time requires editors to establish priorities for, and allocate space or time to, news events. Analysis of "public interest" is invariably involved; a report's "effectiveness" or impact must be weighed. Timing may be crucial. The difficulties involved in this process of decisionmaking entails a great many implicit and explicit value-choices and reflect not only overt consideration of these factors but personal philosophies.

These complex and sensitive deliberations demand an atmosphere conducive to candor and creativity. Court-ordered scrutiny is the antithesis. Apprehension that decisions, opinions, and ideas expressed in the heat of editorial conferences will be subsequently exposed to public view can only inhibit free expression. In addition, exposure could reveal confidential sources,<sup>22</sup> newsgathering techniques, editorial strategies, and personal and political philosophies of editors.

This Court has long recognized the need to protect the candor and uninhibited decisionmaking processes of governmental bodies. As was observed in *United States v. Nixon*, 418 U.S. 683, 705 (1975):

... the importance of this confidentiality is too plain to require further discussion. Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process.

A common law privilege exists against probing the internal decisionmaking functions of government agencies.<sup>23</sup> *Morgan v. U.S.*, 304 U.S. 1 (1938); *Graham v. National Transportation Safety Board*, 530 F.2d 317, 320 (8th Cir. 1976); *National Courier Ass'n v. Board of Governors of Federal Reserve System*, 516 F.2d 1229 (D.C. Cir. 1975); *National Nutritional Foods Ass'n v. Food and Drug Administration*, 491 F.2d 1141 (2d Cir.), *cert. den.*, 419 U.S. 874

22. The importance of protecting confidential sources has long been recognized. *Blasi, The Newsmen's Privilege: An Empirical Study*, 70 MICH. L. REV. 229 (1971); *Branzburg v. Hayes*, *supra*; *Baker v. F. & F. Investment*, *supra*.

23. Congress has also exempted certain internal governmental decisionmaking processes from disclosure under the Freedom of Information Act, 5 U.S.C. §552(b)(5).

(1974). This Court has also recognized the need to protect the mental processes of the judiciary. *Branzburg v. Hayes*, *supra*, 408 U.S. at 684; *Pell v. Procunier*, *supra*, 417 U.S. at 834; *Houchins v. K.Q.E.D.*, *supra*, 46 U.S.L.W. at 4838-39 (Stevens, J., dissenting). Candor in the newsroom is equally necessary if the press is to probe government as the First Amendment conceived it should.

Furthermore, if the public figure may compel discovery of editorial decisions, a grave danger exists triers-of-fact will be encouraged to infer "recklessness" from discrete editorial decisions which they dislike. If the press assumes an unpopular position, as it may well have here, this likelihood is increased. For this reason Chief Justice Burger observed that editorial decisions are beyond the reach of government:

For better or worse, editing is what editors are for; and editing is selection and choice of material. That editors—newspapers or broadcast—can and do abuse this power is beyond doubt, but . . . calculated risks of abuse are taken to preserve higher values.

*CBS*, *supra* at 124-25. *Tornillo* confirmed this rule.

*Tornillo* teaches that no court, judge or jury, may tell editors how editorial judgments should be made or editorial opinions reached, any more than can a legislature. False statements are reviewable to the extent *Sullivan* permits. But editorial judgments are neither true nor false; as opinions, they are nonreviewable. If a judicial trier-of-fact would substitute its judgment for that of the editor, liability could attach to opinions. This Court has unequivocally precluded any such liability. *Gertz v. Welch*, *supra*, 418 U.S. at 339-40; see also *Buckley v. Littell*, 539 F.2d 882 (2d Cir. 1976), *cert. den.*, 429 U.S. 1062 (1977).

#### 4. The Impact on Public Figure Plaintiffs of Non-Discovery of the Editorial Process is Minimal.

There is no merit to the contention that a *Sullivan* libel plaintiff requires discovery into the editorial process to meet the "heavy burden" imposed by the actual malice standard. It is axiomatic there can be no direct evidence of an individual's state of mind; the inner state must be inferred from his behavior or conduct. This principle was recognized by this Court long ago:

. . . while objective facts may be proved directly, the state of a man's mind must be inferred from the things he says or does. Of course we agree that the courts cannot "ascertain the thought that has had no outward manifestation." But courts and juries every day pass upon knowledge, belief and intent—the state of men's minds—having before them no more than evidence of their words and conduct, from which, in ordinary human experience, mental condition may be inferred. See 2 WIGMORE, EVIDENCE 3d ed. §§244, 256 *et seq.*

*American Communications Association v. Douds*, 339 U.S. 382, 411 (1950).

What is true generally of state-of-mind proof remains valid in libel actions. State of mind "is ordinarily inferred from objective facts". *Washington Post v. Keogh*, *supra*, 305 F.2d at 967-8. This Court notes in *St. Amant v. Thompson*, *supra*, evidence which would support an inference of actual malice:

The defendant in a defamation action brought by a public official cannot, however, automatically insure a favorable verdict by testifying that he published

with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports. 390 U.S. at 732 (footnote omitted).

While the illustrations may not be exhaustive, they are suggestive of the many methods available for proving actual malice which would not compromise First Amendment interests. None listed above requires disclosure of the editorial process.

What the Court of Appeals agreed should remain undiscovered was the editorial process—opinions and conclusions, the basis of the choice of material selected to include in the broadcast, the basis of decisions made with regard to the duration and content of the broadcast, the reasons for the treatment accorded public issues and officials, and discussions relating to themes which are an essential part of the process.<sup>24</sup> To the extent these questions explore matters of editorial judgment, they are not even relevant.

24. While the exact scope of the protection afforded by the Court of Appeals may not be susceptible to expression in a "bright-line" rule, it is more ambiguous than protection already accorded the attorney/client relationship, 4 MOORE'S FEDERAL PRACTICE §26.60(2); matters affecting the public interest, 4 MOORE'S FEDERAL PRACTICE §26.60(3); and governmental papers, 4 MOORE'S FEDERAL PRACTICE §26.61(1) *et seq.*

Judge Oakes canvassed the consequences of denying Herbert discovery of the editorial process:

"Actual malice can be proved in a number of ways. Logical inferences from the inconsistency, say, between a television program's content and contrary facts which a plaintiff might independently establish would provide an obvious starting point for such proof. Moreover, a plaintiff might adduce circumstantial evidence from participants or interviewees on the television program. In this case, for example, documents furnished under the Freedom of Information Act indicate that Lando's state of mind may be provable without directly impinging on the editorial process. While I offer no opinion on the admissibility or adequacy of this evidence to prove actual malice, it is clear that an editor's state of mind can be examined without discovering facts at the heart of the editorial process. Limiting discovery to those matters and persons not at the heart of the editorial process does not transform the *Sullivan* rule into a nullity for putatively libeled public figures. They can prove actual malice without endangering the editorial process which *Tornillo* held to be protected by the First Amendment.<sup>31</sup>

31. "Limiting plaintiff's discovery concededly may deprive him of adducing the best proof of malice in the common law sense of ill will toward the plaintiff. But *Sullivan* itself distinguishes common law malice from actual malice. Limiting proof of actual malice as defined in *Sullivan* resembles other rules of evidence which limit the 'search for truth' in the interests of a higher social policy. See, e.g. Fed. R. Evid. 407, precluding introduction of subsequent remedial measures to provide negligence in order to encourage the promotion of safety."

568 F.2d 974, 993 (1977)

As Judge Oakes acknowledged, *some* effect may result from non-discovery. But that effect is only that the evidence to prove "actual malice" will be the kind of evidence normally used to prove "state of mind"—inferences from demonstrable fact. When this slight impact on the public figure libel plaintiff is balanced against the devastating consequence to editorial decisionmaking—itslf the core of press freedom—surely the First Amendment must outweigh that impact.

### CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief of The New York Times Co., The Washington Post Company, The Miami Herald Publishing Co., et al., as Amici Curiae was served by mail this 31st day of July, 1978 upon the following:

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JUL 31 1978

MICHAEL BOGAK, JR., CLERK

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1977

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**No. 77-1105**

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ANTHONY HERBERT, *Petitioner*

v.

BARRY LANDO, MIKE WALLACE and CBS, INC.,  
*Respondents*

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**BRIEF AMICUS CURIAE OF  
AMERICAN NEWSPAPER PUBLISHERS  
ASSOCIATION**

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*Respondents*

**BRIEF AMICUS CURIAE OF  
 AMERICAN NEWSPAPER PUBLISHERS  
 ASSOCIATION**

**PRELIMINARY STATEMENT**

By consent of the Petitioner and the Respondents herein, the American Newspaper Publishers Association submits this brief as *amicus curiae*. Copies of the written consents of all parties have been filed with the Clerk of this Court.

**INTEREST OF THE AMICUS CURIAE**

The American Newspaper Publishers Association (ANPA) is a non-profit membership corporation organized and existing under the laws of the Commonwealth of Virginia. Its membership consists of 1293 newspapers constituting more than 91 percent of the

total daily and Sunday newspaper circulation and a significant portion of the weekly newspaper circulation in the United States. ANPA is concerned with issues of general significance to the profession of journalism and the newspaper publishing business and, over the years, ANPA on several occasions has presented its views to this Court as an *amicus curiae* in cases touching on these concerns.

ANPA agrees with the statements of the case as presented by both Petitioner and Respondents; the Association enters this case as *amicus curiae* on the basis of its belief that the constitutional issue posed by Petitioner and respondents could have, and should have, been avoided. ANPA contends that the lower courts, prior to considering the First Amendment issue raised, should have addressed the requests of Petitioner, and Respondents' refusals to comply with such requests, in the context of the limits and restrictions on the scope of discovery available under the Federal Rules of Civil Procedure.

Recognizing that the permissible scope of discovery is a matter left to the discretion of the trial judge, ANPA asserts that, in the instant case, the trial judge failed to properly evaluate and balance the competing interests of the Petitioner in obtaining discovery of certain matters and the concomitant public interests in preserving the confidentiality of such matters. Your *amicus* suggests that there is a significant public interest in preserving the confidentiality of the editorial thought process and, thereby, insuring that there will be "uninhibited, robust, and wide open" debate in the newsroom which will lead to the publication of complete and accurate information and news.

Just as the compelled disclosure of affiliations with groups engaged in advocacy entails "the likelihood of a substantial restraint upon the exercise of . . . [the] right of freedom of association," *NAACP v. Alabama*, 357 U.S. 449, 462 (1958), the compelled disclosure of the thought processes of editors and reporters in civil libel suits may have an inhibitory effect upon "free expression" in the newsroom. This Court's recognition of the constitutional role of "an untrammelled press as a vital source of public information," *Grosjean v. The American Press Co.*, 297 U.S. 233 (1936), necessitates a consideration and balancing of the public interest in preserving the confidentiality of the editorial thought process against an individual libel plaintiff's need to have access to such information. For this reason, ANPA supports the holding of the United States Court of Appeals for the Second Circuit and desires to present to this Court, for its assistance, the Association's views in regard to the matter involved in the instant case.

#### ARGUMENT

Notwithstanding that the Court of Appeals decided the instant case on constitutional grounds, the controversy related to the permissible scope of discovery in a public figure libel case. The decision giving rise to the appeal resulted from the trial court's ruling on Herbert's motion to compel discovery pursuant to Federal Rule of Civil Procedure 37(a)(2). Your *amicus* suggests that resolution of the constitutional issue could have been avoided had the court focused specifically on the scope of discovery issue. "[N]o matter how much [the litigants] may favor the settlement of an important question of constitutional law, broad considerations of the appropriate exercise of judicial

power prevent such determinations unless actually compelled by the litigation before the Court." *Barr v. Matteo*, 355 U.S. 171, 172 (1957).

As was so well articulated by Judge Kaufman and Judge Oakes in the opinions below, there is a significant public interest in preserving the confidentiality of the thoughts and opinions of editors and reporters relating to their determinations as to what will be published. The inhibitory effect on the editorial thought process which would flow from the forced disclosure of such mental processes would redound to the public detriment in that the public's expectation of, and right to receive, complete and accurate information would be diminished.

There is also, however, a significant public interest in according to civil litigants ample and broad discovery of those matters which are relevant to a given lawsuit. The basic philosophy of the modern discovery rules is that each party shall have access to all relevant information, which is not privileged, and thus be able to prepare his case for trial in a manner that will promote a just, speedy, and inexpensive determination of the action. "Modern instruments of discovery serve a useful purpose . . . They together with pretrial procedures make a trial less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 682-83 (1958).

Although liberal and extensive discovery is permitted under the Federal Rules of Civil Procedure, there are, necessarily, some limitations imposed, and certain matters are barred from discovery. The rules themselves

designate some of the areas in which discovery will not be permitted. For example, there may be no inquiry as to an attorney's "work-product," FRCP 26(b)(3); nor may discovery be had of materials which are protected by a recognized privilege, FRCP 26(b)(1) and Federal Rule of Evidence 501. The rules, however, do not specify with particularity every area in which discovery may be limited or foreclosed. Rather, the determination of what restrictions or limitations on discovery are required is left to the sound discretion of the trial judge to be exercised on a case-by-case basis.

**Under The Federal Rules of Civil Procedure Pertaining to Discovery, a Court Must Balance the Public Interest in Preserving the Confidentiality of Opinion Matter Against the Discovering Party's Need for the Information Before Determining the Permissible Scope of Discovery**

Whenever a trial court is presented with a motion under Rule 26(c) to limit discovery, or a motion under Rule 37(a)(2) to compel discovery, it must, within the sound exercise of its discretion, consider the factors contained in Rule 26 which outline the permissible boundaries of discovery.<sup>1</sup> Just as the rules afford broad latitude for discovery, a trial judge is granted broad power to limit or restrict discovery.

"Rule 26(c) was added as a safeguard for the protection of parties and witnesses in view of the almost unlimited right of discovery given by Rule 26(b). The provision emphasizes the complete control that the court has over the discovery process. It is impossible to set out in a rule all of the cir-

<sup>1</sup> FRCP 37(a)(2) provides that:

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26(c).

cumstances that may require limitations that may be needed. The rules, instead, permit the broadest scope of discovery and leave it to the enlightened discretion of the district court to decide what restrictions may be necessary in a particular case. . . . [A] court may be as inventive as the necessities of a particular case require in order to achieve the benign purpose of the rule."

8 Wright & Miller, Federal Practice and Procedure, § 2036 at 267-269 (footnotes omitted).

While Rule 26 contains several specific references to factors to be considered in limiting the scope of discovery, in the instant case the primary justification for imposing restrictions stems from the public interest in protecting from discovery certain confidential or sensitive matters. "The public interest may be a reason for not permitting inquiry into particular matters by discovery." 4 Moore, Federal Practice, ¶ 26.22(2) at 1287 (2d Ed. 1969). In this case, it is the public interest in preserving the confidentiality of the editorial thought process which calls for restriction of discovery. As noted by the Court of Appeals and amply discussed in the Brief of Respondents, there is a significant public interest in preserving the confidentiality of editorial thought processes. Journalists, faced with the prospects of having to reveal their thoughts, opinions and conclusions in civil lawsuits, would be inhibited from fully and frankly examining and discussing their concerns before publishing sensitive news stories. The public has an interest in receiving true and accurate information from the press, and that interest can best be served by shielding the editorial thought process from overbroad discovery and thereby insuring that controversial stories and/or stories involving contradictory versions

of events will be fully explored and discussed prior to publication.

The courts, in a variety of situations, have limited and/or restricted discovery due to the public interest which is served by preserving confidentiality. In each such case, the court has balanced the public interest in maintaining confidentiality against the moving party's need to discover the information sought for purposes of preparing his lawsuit. Although the courts almost always grant discovery of non-privileged facts, they, generally, have denied discovery of opinions, conclusions or thoughts.

In *Frankenhauser v. Rizzo*, 59 FRD 339 (E.D.Pa. 1973), the plaintiffs sought discovery of police investigative reports concerning the shooting incident which formed the basis of their civil rights action against the police. Plaintiffs asserted that the discovery was essential to preparation of their case. The defendants asserted executive privilege and argued: "[P]olice investigations such as the one here involved are made under a veil of confidentiality and . . . it would contravene the public interest and would impair the functions of the police department if the results of such investigations were disclosed. [Defendants] contend that destruction of the confidentiality of police investigative records would have a 'chilling effect' upon the department and would impede candid and conscientious self-evaluation of actions of the department." 59 FRD at 342. The court, after a lengthy discussion of the considerations governing the scope of discovery in that particular situation, held that witness statements and those portions of the police reports containing factual data were discoverable. The evaluative summary portions of the reports, however, were held not subject to discovery.

The same result was reached in similar circumstances in *Gaison v. Scott*, 59 FRD 347 (D.Hawaii 1973).

The "interest of promoting the free and candid interchange of ideas as a means to achieving effective executive decisions . . ." was held to prohibit the defendants from probing the thoughts of a governmental official in *Securities and Exchange Commission v. Perera Company*, 47 FRD 535 (S.D.N.Y. 1969). There, the defendants in an action under the Securities Act of 1933 asserted that an advisory opinion released by the Securities and Exchange Commission was "deceitful" and intentionally misleading. They sought to depose the official who had been ultimately responsible for the issuance of advisory releases. The court, noting that it was necessary to "carefully weigh" the "competing interests," found that it was not in the public interest to compel the government to disclose its "prefatory thinking".

Cases in which there was an asserted "executive privilege" are not, however, the only instances in which discovery of opinions has been denied because of the public interest in confidentiality. Even in the absence of any conditional privilege recognized by law, the courts have barred discovery of opinions and conclusions where the need for preserving confidentiality overrode the need for discovery. In the leading case of *Bredice v. Doctors Hospital, Inc.*, 50 FRD 249 (D.D.C.), *adhered to*, 51 FRD 187 (D.D.C. 1970), *aff'd*, 479 F.2d 920 (D.C.Cir. 1973), the court barred discovery of the minutes and reports of boards and committees of the defendant hospital which related to the circumstances of the death of a patient which gave rise to the malpractice lawsuit. The defendant hospital held periodic "staff meetings" to review and analyze

clinical work for the purpose of improving hospital and medical standards. Although the decedent's treatment was discussed at one of these meetings, the court held that the "overwhelming public interest in having those staff meetings held on a confidential basis so that the flow of ideas and advice can continue unimpeded" created a qualified privilege which barred discovery:

"Confidentiality is essential to effective functioning of these staff meetings; and these meetings are essential to the continued improvement in the care and treatment of patients. Candid and conscientious evaluation of clinical practice is a *sine qua non* of adequate hospital care. To subject these discussions and deliberations to the discovery process, without a showing of exceptional necessity, would result in terminating such deliberations. Constructive professional criticism cannot occur in an atmosphere of apprehension that one doctor's suggestion will be used as a denunciation of a colleague's conduct in a malpractice suit."

50 FRD at 250. The same reasoning was followed in *Gillman v. United States*, 53 FRD 316 (S.D.N.Y. 1971), wherein the court granted discovery of those portions of the reports containing testimony as to the incident but denied discovery as to those portions which evaluated the hospital procedures and made suggestions as to future procedures.

Similarly, in an employment discrimination case the court denied discovery of so much of the defendant's internal reports on its progress in the equal employment opportunity area as indicated "candid self-analysis and evaluation of the Company's actions" in that area. *Banks v. Lockheed-Georgia Company*, 53 FRD 283 (N.D.Ga. 1971). While the court held that discovery could be had of factual matter contained in the re-

port, it determined that it "would be contrary to [public] policy to discourage frank self-criticism and evaluation", and that to permit discovery of evaluations and opinions "would not be conducive to compliance with the law." 53 FRD at 285.

Those portions of a Forest Service Investigator's report on a fire which represented "mere guesses, opinions, theories, comments or recommendations of witnesses or of an investigator, or mere summations or notations made by him concerning information orally obtained from witnesses" were barred from discovery in *People of the State of California v. United States*, 27 FRD 261 (N.D.Cal. 1961), although discovery was allowed as to statements of witnesses and statements of fact contained in the report. The court, while recognizing that this Court's opinion in *Hickman v. Taylor*, 329 U.S. 495 (1947), mandated that either party could be compelled "to disgorge whatever facts he had in his possession", stated that opinions, theories or recommendations were akin to "work-product" and, therefore, deserving of protection from discovery:

"Although such a report is not entitled to protection under the 'attorney-work-product' privilege . . . , because it generally is made by an investigative agent acting in other than a legal capacity, where it contains material in the nature of opinion, theory, or recommendation, made either by witnesses or the investigator, such a document or report partakes of the nature of an attorney's notes in preparation of his case, and production of such material should, therefore, be conditioned upon a strong showing of necessity."

27 FRD at 262.

In all of the above cases, the courts have permitted discovery of factual matter but have barred discovery of opinion matter. The reason for limiting discovery in those cases was that there was a public interest in preserving the confidentiality of the opinion matter which, on balance, outweighed the need of the discovering party to be granted access to such material. In the instant case, Respondents have supplied Petitioner with *extensive* documents and testimony as to the factual matters sought; it is only the opinion matter which Respondents have refused to supply.<sup>2</sup>

As was pointed out above, there is a significant public interest in preserving the confidentiality of the editorial thought process from discovery. Moreover, as in *People of the State of California v. United States*, *supra*, the opinions and conclusions of editors are akin to the "work-product" of attorneys. Editors and reporters are well acquainted with the law of libel and the standards of care applicable thereto, and pre-publication discussions of news stories involve frank evaluations of the potential of a story to give rise to a libel claim. Were such evaluative discussions to be subject to discovery, reporters and editors would be reluctant to speak with candor and would be inhibited from fully expressing their views to the ultimate detriment of professional presentation of news to the public.

The permissible scope of discovery must be determined on a case-by-case basis. The trial judge must

<sup>2</sup> As pointed out by the Court of Appeals, the extensive amount of material already provided to Petitioner through discovery is more than ample for him to present a case to the jury and allow the jury to determine whether or not the publications were made with actual malice. *Herbert v. Lando*, 568 F.2d 974, 984 and 992-93 (Oakes, J. concurring) (2d Cir. 1978).

evaluate the discovering party's need for the information, consider the amount of discovery which already has taken place, determine the burden which would be imposed on the non-discovering party(ies), and, finally, balance the competing interests. In the instant case Respondents have supplied Petitioner with full discovery as to their sources and the information they provided (including transcripts of interviews), copies of documentary source materials, a series of drafts of the "60 Minutes" telecast, and the contents of pre-telecast conversations between Lando and Wallace. In view of this completely reasonable and adequate discovery, further inquiry into the necessarily tentative conclusions and mental impressions which evolved in the minds of Respondents in the course of their pre-publication editorial thought process must not be permitted to take precedence over society's vital stake in preserving and encouraging candor and professionalism in the corroborative examination and re-examination by editors of news gathered for possible publication.

#### CONCLUSION

It is respectfully submitted that, for the reasons stated above, the holding of the United States Court of Appeals for the Second Circuit should be affirmed.

Respectfully submitted,

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AUG 14 1978

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IN THE  
Supreme Court of the United States  
OCTOBER TERM, 1977

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No. 77-1105

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*Petitioner,*

v.

BARRY LANDO,  
MIKE WALLACE & CBS INC.,

*Respondents.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SECOND CIRCUIT

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**MOTION FOR LEAVE TO FILE BRIEF  
AMICUS CURIAE AND BRIEF AMICUS  
CURIAE OF TIME INC.**

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*Respondents.*

---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SECOND CIRCUIT

---

**MOTION OF TIME INC. FOR LEAVE TO FILE  
BRIEF AMICUS CURIAE**

Time Inc. hereby respectfully moves for leave to file the attached brief *amicus curiae* adopting the views of other *amici* in this case. The consent of counsel for respondents has been obtained. Despite repeated attempts, Time Inc. has been unable to obtain the consent of counsel for petitioner.

As a publisher of magazines, newspapers and books and a producer and supplier of films and television

programming, Time Inc. constantly faces the threat of litigation arising out of material which it disseminates to the public. That ever-present threat, if combined with the enormous litigation costs which would be generated by the type of unlimited discovery authorized by the District Court in this case (the constitutionality of which is here at issue), would have a chilling effect on exercise of the First Amendment freedom of the press. This Court has recognized that "fear" of the "expense" of defending a prolonged litigation can have such an impact. *Time Inc. v. Hill*, 385 U. S. 374, 389 (1967); *New York Times Co. v. Sullivan*, 376 U. S. 254, 279 (1964). Such discovery also constitutes an unwarranted intrusion by the government into the editorial process, a process which this Court has held is protected by the First Amendment. *Miami Herald Publishing Co. v. Tornillo*, 418 U. S. 241 (1974).

Thus, resolution of the issues presented by this case will have far-reaching consequences for Time Inc. and all those who are providing news and information to the general public. In an action where such issues are presented it is important that the Court have before it a full exposition of the Constitutional questions and of the views of those who will be affected by the ruling. It is for that reason that Time Inc. asks leave of the Court to join the other *amici* news organizations in their submission requesting this Court to affirm the Second Circuit in its reversal of the District Court's refusal to apply the dictates of the First Amendment to attempts to obtain unlimited discovery against a libel defendant.

Respectfully submitted,

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IN THE  
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ANTHONY HERBERT,

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ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SECOND CIRCUIT

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**BRIEF AMICUS CURIAE OF TIME INC.**

Time Inc. is in full agreement with the views set forth in the *amicus* brief served July 31, 1978, and filed on behalf of The New York Times Co., et al., and hereby joins in that brief.

August 11, 1978

Respectfully submitted,

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